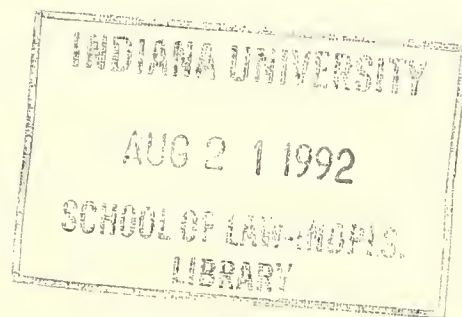




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ARTICLES

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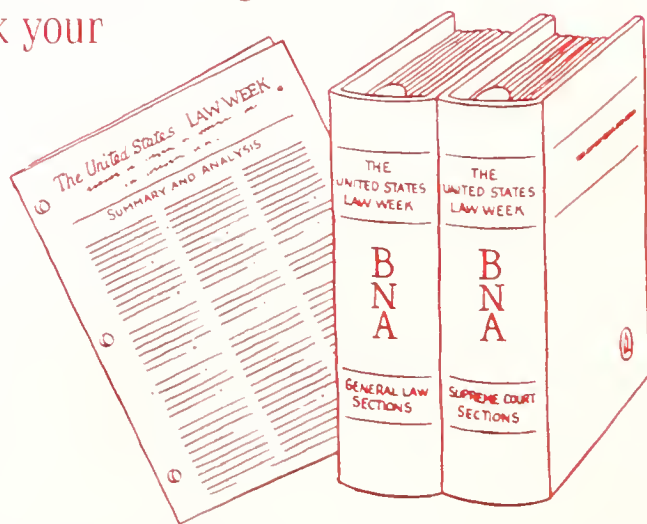
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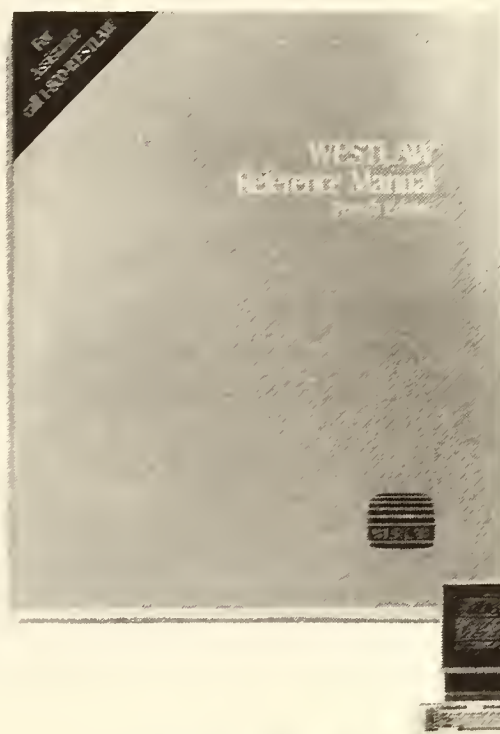
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Editors Note

In 1991, Professor Robin Paul Malloy published his book *Planning for Serfdom: Legal Economic Discourse and Downtown Development*, which he describes as “controversial for its thesis that America is drifting into a new age of serfdom and statist ideology.” Professor Malloy has also authored numerous works in the areas of real estate development and legal economic discourse.

This issue of the *Indiana Law Review* presents a collection of articles focusing on urban development and Professor Malloy’s views on downtown development in Indianapolis. These articles also comment on the fine line between public and private development and the proper role of lawyers, planners, and politicians. Perhaps David Hume was right when he wrote in 1741, “Nothing appears more surprising to those who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few.” Today the *Indiana Law Review* presents a forum for an analytical look at how the few in government use their resources to expand our cities and the types of resources they will provide. Although these articles do not necessarily represent the views of the Indiana University School of Law—Indianapolis or the members of the *Indiana Law Review*, we are pleased to present a forum for the discussion of issues that affect our nation’s cities.

The *Indiana Law Review* welcomes comments and replies to the enclosed articles. We hope that you enjoy this exchange.

Rolanda Moore Haycox
Editor-in-Chief, Volume 25
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ARTICLES

Planning for Serfdom — An Introduction to a New Theory of Law and Economics

ROBIN PAUL MALLOY*

PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT, *Robin Paul Malloy*. University of Pennsylvania Press, 1991. P.O. Box 4836, Hampden Station, Baltimore, Maryland 21211 (1-800-445-9880).

In my book, *Planning for Serfdom*,¹ I bring together much of what I learned from a prolonged study of ideology in law and economics

* Professor of Law and Economics, Syracuse University College of Law. Research Fellow of the Center for Semiotic Research in Law, Government, and Economics, Penn State University.

1. ROBIN P. MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT (1991) [hereinafter MALLOY, SERFDOM]. See also ROBIN P. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990) (a basic text for those people seeking to learn more about this subject); Robin P. Malloy, *Expanding Boundaries: Law and Economics as Creative Discourse*, in III SEMIOTICS AND THE HUMAN SCIENCES (R. Kevelson ed., 1992); Robin P. Malloy, *Freedom From Authority — Discovering “The Discovery of Freedom” by Rose Wilder Lane*, in II SEMIOTICS AND THE HUMAN SCIENCES: ACTION AND AGENCY (R. Kevelson ed., 1991); Robin P. Malloy, *Adam Smith’s Conception of Individual Liberty*, in LAW AND ENLIGHTENMENT IN BRITAIN (T. Campbell & N. McCormick eds., 1990); Robin P. Malloy, *Of Icons, Metaphors, and Private Property — The Recognition of “Welfare” Claims in the Philosophy of Adam Smith*, in III LAW AND SEMIOTICS (R. Kevelson ed. 1990); Robin P. Malloy, *Market Philosophy in the Legal Tension Between Childrens’ Autonomy and Parental Authority*, in PERSPECTIVES ON THE FAMILY (R. Moffat et al. eds., 1990) (originally published at 21 IND. L. REV. 889 (1988)); Robin P. Malloy, *Toward a New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27 (1991) (a special symposium issue on Law and Economics, and Semiotic Process); Robin P. Malloy, *Is Law and Economics Moral? — Humanistic Economics and a Classical Liberal Critique of Posner’s Economic*

and of the relationships that govern human interaction in the urban development context. From my research, I developed a general theory of law and economics that governs the proper relationship between the individual, the community, and the state. The general theory comprises Part I of the book and covers a variety of topics, including a detailed analysis of classical liberal theory emphasizing the work of Adam Smith, Friedrich Hayek, and Milton Friedman.² Other topics covered in Part I include a discussion of the checks and balances systems of federal, state, and local government as well as between the executive, legislative, and judicial branches;³ an analysis of political versus economic means for accomplishing desirable social goals;⁴ a new interpretation of the "tragedy of the commons" that describes government and the exercise of state power as an overly used public good;⁵ explanations of individual liberty, community liberty, and state liberty as they apply to classical liberal, conservative, liberal, left communitarian, and libertarian theory;⁶ and an analysis of the "first principle" foundation that supports any theory of law and economics and urban life.⁷

Analysis, 24 VAL. U. L. REV. 147 (1990) (this issue of the Law Review published a full debate between myself and Judge Posner concerning the humanistic elements of legal economic reasoning); Robin P. Malloy, *The Limits of "Science" in Legal Discourse — A Reply to Posner*, 24 VAL. U. L. REV. 175 (1990) (part of the debate between myself and Judge Posner); Robin P. Malloy, *Equity Participations and Lender Liability Under CERCLA*, 25 COLUM. J. ENVTL. L. 301 (1989); Robin P. Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics*, 36 KAN. L. REV. 209 (1988); Robin P. Malloy, *The Merits of the Smithian Critique: A Final Word on Smith and Posner*, 36 KAN. L. REV. 266 (1988); Robin P. Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67 (1987); Robin P. Malloy, *Equating Human Rights and Property Rights — The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163 (1986); Robin P. Malloy, *The Secondary Mortgage Market: A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991 (1986); Robin P. Malloy, *The Economics of Rent Control — A Texas Perspective*, 17 TEX. TECH L. REV. 797 (1986); Robin P. Malloy & Michael H. Hoeflich, *The Shattered Dream of American Housing Policy — The Need for Reform*, 26 B.C. L. REV. 655 (1985); Robin P. Malloy, *Lender Liability for Negligent Real Estate Appraisals*, 1984 U. ILL. L. REV. 53 (1984); Robin P. Malloy, *The Interstate Land Sales Full Disclosure Act: Its Requirements, Consequences, and Implications for Persons Participating in Real Estate Development*, 24 B.C. L. REV. 1187 (1983); Robin P. Malloy, *Mortgage Insurers Should Be the Risk Takers*, 17 REAL EST. REV. 94 (1987); Robin P. Malloy, *Creative Financing Exposes Lenders to Developers' Liabilities*, 15 REAL EST. REV. 60 (1985).

2. MALLOY, *SERFDOM*, *supra* note 1, at 16-29. In particular, see Chapters 3, 7, 8 & 9 which discuss classical liberal theory. Chapter 3 and its footnotes include an extensive analysis of the works of Adam Smith.

3. *Id.* at 30-37.

4. *Id.* at 38-44.

5. *Id.* at 45-48.

6. *Id.* at 49-83.

7. *Id.* at 84-86.

In Part II, I apply the general theory to the specifics of urban development and revitalization. I examine the use of planning and zoning techniques as well as a variety of commonly used financial arrangements.⁸ I discuss political, economic, and philosophical problems governing the law in this area.⁹

From the perspective of law and economics, I have looked at the legal, political, and economic arrangements that are used to foster urban development and revitalization.¹⁰ As such, I have asked: What do the emerging trends in legal, political, and economic relationships reveal about our culture, our concepts of self and community, and about the philosophical vision and direction of American society? I believe that by studying the legal arrangements employed for urban development and revitalization, we can learn a great deal about ourselves and about the ideological direction in which we are headed.

A study of recent trends in the legal relationships employed in the development and revitalization of American cities reveals many important changes in American society.¹¹ American urban environments over the last ten years have been experiencing what some people have called a "Renaissance" of redevelopment. Cities like New York and Chicago, as well as Indianapolis and other urban places, have all experienced major redevelopment that helped or is helping to transform neighborhoods and even entire cities. The projects undertaken in these cities are generally new upscale housing (not low-income housing), shopping centers, festival marketplaces, office buildings, restaurants, and to a limited extent, public squares or open spaces as a part of or adjoining a specific development project.¹² In some cities the impact has been tremendous, but what do these changes tell us about these places and the people that live there?

Although I briefly examined St. Louis, Louisville, Pittsburgh, and Boston, I did a detailed and in-depth review directed at the city of Indianapolis, Indiana. As a former faculty member of the School of Law, Indiana University—Indianapolis, I was able to obtain a great deal of information on city activities. Indianapolis is a city cited by the Reagan Administration,¹³ *National Geographic*,¹⁴

8. *Id.* at 89-102.

9. *Id.* at 113-28.

10. *Id.*

11. *Id.* at 12-15, 103-12, 129-39.

12. *Id.*

13. ROBERT DUCKWORTH ET AL., *THE ENTREPRENEURIAL AMERICAN CITY* 6-8 (1986). This book is printed and distributed by the Department of Housing and Urban Development.

14. Louise E. Levathes, *Indianapolis: City on the Rebound*, 172 NAT'L GEOGRAPHIC 2230-59 (1987).

Smithsonian,¹⁵ the *Urban Land Institute*,¹⁶ and *Newsweek*¹⁷ as an example of our new urban possibilities. For this reason, Indianapolis proved worthy of a detailed study and discussion,¹⁸ a discussion that critically evaluates the public relations clips of city officials and that probes these heralded new urban possibilities to determine their negative and positive implications not only for Hoosiers, but also for American society.

Indianapolis, a city of about one million people, is located in the heart of the midwestern "rustbelt."¹⁹ Between 1980 and 1987, Indianapolis had over \$1 billion in new construction in the downtown urban center.²⁰ Although \$1 billion spent in New York City may not be overwhelming, it makes a substantial difference in a city the size of Indianapolis. As a result of this new investment, downtown Indianapolis now has dozens of *new* office buildings, shopping centers, sport facilities, restaurants, and upscale apartment complexes — not to mention a new multimillion dollar "River Walk" designed for downtown public spaces, shopping, and eating.

It is important to note that Indianapolis had plenty of this type of development occurring before the city decided to get involved as a public partner in real estate development activity. The outer city and nearby suburbs were being actively developed without extensive government incentives. City leaders, however, wanted more development in the *urban center*. Thus, a major push began that involved millions of dollars in public subsidies for development in order to get private parties to build *city planned* projects for the *urban center*. One of the latest moves in this direction has been the continuing fight to locate an upscale shopping mall downtown. In an effort to obtain a private developer to construct the mall, the city is promising to provide one-half of the now estimated \$600 million cost.²¹ This \$600 million would be among the recent additions to the prior \$1 billion spending binge in Indianapolis. In *Planning for Serfdom*, I outline in detail the behind the scenes political games and manipulations that led Indianapolis to pursue a wide variety of redevelopment projects. My research indicates that many of the decision-makers committing public funds to such efforts are unaccountable to

15. Doanld D. Jackson, *Indianapolis: A Born-Again Hoosier Diamond in the Rust*, SMITHSONIAN, June 1987, at 70-80.

16. Rita Bamberger & David Parham, *Leveraging Amenity Infrastructure — Indianapolis' Economic Development Strategy*, URB. LAND, Nov. 1984, at 12-18.

17. Frank Maier, *A Rust-Belt Relic's New Shine*, NEWSWEEK, Sept. 9, 1985, at 26.

18. MALLOY, SERFDOM, *supra* note 1, at 4-5.

19. *Id.* at 103.

20. *Id.*

21. *Id.* at 104-07 (estimated costs of the mall have changed repeatedly with news items since completion of this manuscript, indicating an ever increasing cost).

the voters, and frequently have benefited directly or indirectly from city investments.²² This is important to know because it can help us understand the significance of certain trends in the legal and economic approaches to urban development.

Fundamental to emerging trends in urban development programs such as those employed in Indianapolis, is an underlying change in the relationship between public and private roles in real estate development and promotion. New planning and financing strategies have emerged which have transformed the environment for urban development *from a competitive and adversarial process into a "cooperative" environment* where public and private resources are combined in the pursuit of "mutual" objectives.²³ Lawyers and other professionals forge new and creative methods for accomplishing urban development, but they tend to do so without asking how these new and creative methods may affect underlying social norms and values. For example, they create new ways for the *state* to finance, manage, and encourage new project development, *but* they fail to ask: (1) Is this an appropriate function for the state and (2) how will such action affect underlying cultural assumptions and norms concerning the economic and political marketplace upon which so many of our laws and institutions rest? In my research, I have focused on these activities by analyzing two primary components of urban development: planning and zoning considerations²⁴ and financing arrangements.²⁵

In first considering the area of planning and zoning, I identify three major context periods in the historical analysis of planning and zoning. These periods are:

(1) The *frontier period* which in many ways was ideologically close to being a period of "Laissez Faire" free market activity with respect to land use;²⁶

(2) the *Euclidian period* named for the famous U.S. Supreme Court case of *Euclid vs. Amber Realty*²⁷ which guided zoning

22. *Id.* at 107-11.

23. *Id.* at 89-112.

24. *Id.* at 89-97.

25. *Id.* at 98-102.

26. *Id.* at 89-90. Historically, one envisions limited zoning in colonial America. Beyond simple restrictions for health and safety reasons — such as the height of buildings for fire fighting purposes — there was little intrusion by today's standards. Furthermore, with westward expansion, it was always possible to move west, to acquire land, and to do what you wanted — at least until many more people showed up.

27. 272 U.S. 365 (1926). Under Euclidian zoning, general use zones were established for a community. These zones were established in advance of particular cases of dispute and were based on broad conceptions of safety and public health. A heavy industrial

in the early 1900s and established an ideology of general rules applicable to land use; and

(3) the *discretionary period* in which current trends in zoning and planning evidence an abandonment of general rules in favor of an ideology of outcome specific regulations as evidenced by Special Districts, Planned Unit Developments, Mixed Use Developments, and development approval by negotiation, rather than as of right.²⁸

These evolving context periods reveal an ideological shift in American planning and zoning law that parallels a similar shift in general cultural ideology. The shift reflects a normative movement away from the ideology of the marketplace — an ideology of “impersonal” market generated decisions about land use — to an ideology of *law as politics* with a corresponding focus on discretionary project approval. The new discretionary focus rewards political clout and “personalizes” the process of urban development by enhancing the power of political experts while devaluing the role and function of unplanned and disorganized market behavior. We can observe an ideological shift in American law and culture away from the marketplace and the corresponding values of individual rights by deconstructing and analyzing discrete examples of zoning and land use planning regulation. Similarly, recent trends in financing urban development reveal the same shift in underlying ideology. The forms of financing validated by law give witness to the underlying ideological norms upon which these arrangements are constructed. In the area of urban finance, one can observe a continual blurring of the “boundary line” between the public and private sectors. Historically, urban development was done by private developers risking private resources on particular projects that in their best judgment reflected the best (most profitable) use of land at any given location. Today, urban development is significantly guided by public, rather than private decisionmakers and is substantially funded by public resources combined with private resources. In today’s environment, city planners and politicians are no longer content to map out general restrictions governing land use. Rather, they seek to actively participate in real estate devel-

activity should not, for instance, be placed across the street from a schoolhouse. Thus, general zones for such things as single family residential, public buildings, hospitals, and commercial uses were established. Anyone with a use compatible with a generally described zone had a legally enforceable right to enter the zone. In my book I relate this type of zoning to Hayek’s concept of general rules in government. See MALLOY, *SERFDOM*, *supra* note 1, at 89-92.

28. *Id.* at 92-97. This move towards extensive discretion makes the law very personal. Individuals no longer have legally enforceable rights, but must deal with a political power structure that has broad discretion to do as it pleases.

opment — to participate in the entrepreneurial fulfillment of specific city planned projects that they themselves see as essential to the successful development and marketing of their urban identity.

In this new environment, new approaches to public assisted financing of real estate development have emerged. These “public/private partnerships” or “co-financing” arrangements take many forms, but the underlying objective is twofold: (1) city officials are willing to commit *public* resources and to exercise the power of eminent domain in an effort to assist *private* developers that are willing to build specific politically chosen projects at the time and location set out by city planners and (2) as a partner in the transaction, the city reserves a right to share in some percentage of the income flow generated by the project or the city splits the ownership interest in the project so as to retain a substantial equity position as co-owner of the project.²⁹ Both of these trends — the trend towards more discretionary planning and zoning and the trend towards public financing of private developers — led to the breaking down of traditional private/public distinctions in urban development.

Ideologically, the new environment for urban development moved many development choices into the public forum and shifted power away from the validating discourse of the private marketplace, only to have private market power replaced by public political power. However, shifting power from the private marketplace to the political forum has done little to alleviate the abuse of power in the urban development process. For example, in Indianapolis, a large portion of the \$1 billion of investment *plus* the subsidizing for the new \$600 million downtown mall have gone to one politically well-connected developer.³⁰ Furthermore, most of the city’s development plans were mapped out by a secret “City Commission” that intentionally excluded women and counted only one Black participant among its thirty or so members.³¹ This secret City Commission planned how to spend public funds on urban revitalization, was unaccountable to voters, and perhaps by coincidence, many of its members directly or indirectly benefited from the city’s public adoption of their private plans.³² Little money has found its way into the hands of minority or disadvantaged developers. Rather, the new discretionary and politically flexible approaches to urban financing have benefited, to no one’s surprise, those people already politically well connected. Consequently, the change in ideological focus has primarily resulted in a mere shift of power between already established power groups and has

29. *Id.* at 98-102.

30. *Id.* at 103-08.

31. *Id.* at 108-09.

32. *Id.*

done little to open up the urban development process to a more fair and equitable distribution of power.

Two immediate consequences of these directions in planning and financing are that they create a conflict of interest for public officials, and they destroy the role of private capital as a check on government power. Conflict of interest is evident when the same city officials that decide that their projects are the most *important* projects are later asked to make decisions concerning other private developers that seek to enter the same area of the city. If the private developer will compete with the city-owned project, the city may — as some cities have done, e.g., St. Paul, Minnesota,³³ — refuse to permit the use on the grounds that it might compete with their project. Thus, a *conflict arises* in that city officials have a political stake in assuring the success of *their* projects and yet, are asked to make discretionary decisions affecting competing approaches to urban development.

Regarding the second consequence of destroying the role of private capital, the public/private partnership destroys the ability of private capital to act as a check on government power in two ways. First, it takes potentially dissident voices and co-opts them into political submission by rewarding political cooperation with highly profitable urban development projects. This means that the way to win profits and political clout on a specific project is to join in, rather than question, particular urban development choices. Second, once a party joins a specific project, that party can no longer afford to use private resources to challenge other aspects of the city's political agenda because that party's fate, financial success, and continued political influence are too closely linked to the success of the city's plans. This process greatly diminishes the usefulness of private capital as a means of financing alternative voices. It concentrates power in government and thereby reduces the importance of counterbalancing power sources as a means to a more creative, diverse, and less coercive social environment.

Given this brief overview of the changing roles of public and private parties in the process of urban development, what, if anything, can we learn about changing norms and values in American society? First, we learn that there are many *contradictions* in our society at this stage of the evolution in urban development programs. Again, Indianapolis serves as a good example. Indianapolis and Indiana are well known bastions of conservative politics. Both the state and city are strongly Republican. Public officials constantly provide ample rhetoric in support of the free marketplace, competition, private enterprise, and rugged individualism.

33. See Nina J. Gruen, *Public/Private Projects — A Better Way for Downtown*, URB. LAND, Aug. 1986, at 4 (discussing this type of action in St. Paul, Minn.).

However, in complete contradiction to this rhetoric is an urban development program based on *centralized* urban planning, *public* management, and *government* ownership of almost every major new commercial project in the urban center. Thus, the rhetoric of the marketplace continues, but the reality is that the dominance of government ownership and management of private commercial projects is more reminiscent of “urban socialism” or “state capitalism” than it is of a free marketplace. Even the terms used by public officials to describe these city activities present a contradiction while superficially invoking free market imagery, such as “public *entrepreneurism*” and “public/private *partnerships*.”

However, the major tragedy in this regard has been the unthinking approach of lawyers in creating innovative new legal arrangements for the purpose of “getting the job done” without asking how certain ways of doing the job may dramatically change important cultural norms. At a primary level we need more debate, more information, and greater reflection on these issues of urban redevelopment. We need to unmask the underlying ideology that supports alternative ways of structuring real estate transactions and social arrangements. Through a legal economic critique, one can better assess the alternative values and norms that compete for validation in the law. Maybe in a free society people will say, “The times, the society, have changed. We need to embrace a new philosophy of the world around us — we need to think of more *public* involvement and more state ownership — the old economics, the old individual right’s do not work anymore.” On the other hand, they may say, “We still value the norms invoked by the legal economic traditions of the marketplace, of individual liberty, natural rights, and government regulation by general rules.” The problem at this primary level of analysis is that public debate and open dialogue are suppressed by the political process and by a lack of information. The danger in travelling so far down the paths of current urban development efforts is that we will be unable to engage in meaningful dialogue prior to the destruction of significant and important norms.

If city officials cared about open debate in Indianapolis, why would they have deemed it necessary to place urban redevelopment efforts in the hands of a secret, private, and unaccountable City Commission?³⁴ Should not the major restructuring of an urban community with the use of public resources be the subject of open debate? Is debate avoided by public officials because they think they are smarter or more important than the rest of us, or are they just in it for political and economic gain, seeking the surest way to “line their pockets”? Whatever the answers to these rhetorical questions, it is clear that many of the sub-

34. See MALLOY, SERFDOM, *supra* note 1, at 108-09.

sidized projects in Indianapolis continue to lose money totaling tens of millions of dollars.³⁵ These losses hurt the taxpayers and come at a time when the local Chamber of Commerce is discussing the need for more than \$1 billion to be directed at the basic infrastructure.³⁶

At a secondary level of analysis, we need to do more than debate. We need to take positions concerning the values and norms at stake. On this level of analysis, I argue that recent trends in urban development should be rejected as inappropriate for a society concerned with individual liberty and human dignity. Ideologically, recent trends in urban development and revitalization result in a new age of *serfdom*, a serfdom based on personal status in the political sphere.³⁷ This serfdom is the result of the growing exercise of discretionary political power and is evidenced by the forms of legal economic discourse indicated in current approaches to urban planning and financing. This trend is dangerous to freedom and individual liberty because it concentrates power in the state by blurring public and private distinctions. Thus, this trend combines the most coercive powers of the marketplace with the power of the state. From the point of view of the poor and disenfranchised, there is no good likely to come of this ideological shift away from competitive market values and individual rights. I think the proof of this point is clearly illustrated by the types of projects uniformly pursued by today's urban planners. Urban planners are using public resources and joining forces with private developers *not* to develop substantial low-cost housing, *not* to shelter the homeless, and *not* to provide job training, but rather to build upscale housing, high cost office buildings, and shopping facilities. In part, the new ideology has allowed wealthy capitalists to successfully co-opt the power of the state for their own benefit.

My position against the current trend in urban development is a position against the rising statist ideology that is inherent in the evolving role of the public sphere in the traditionally private marketplace. It is a role that is particularly evil because it destroys the balance needed between the government and the private sphere. This balance is built upon the concept of counter-balancing power sources — the state protects individuals from the abusive and coercive exercise of private power, while private sources of capital serve as a check on the emergence of

35. *Id.* at 104 (for losses from 1987-89); Susan Schramm, *Losses Still Plague 5 Downtown Projects: Partners Take Long-Term View*, INDIANAPOLIS STAR, June 12, 1990, at 1 (losses from 1989-90).

36. *See City Crumbling Around Us*, INDIANAPOLIS NEWS, June 11, 1991, at 1, col. 2; John R. O'Neil, *Study Says City's Infrastructure on Road to Ruin*, INDIANAPOLIS STAR, June 11, 1991, at 1.

37. *Cf.* FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

an all too powerful state apparatus.³⁸ This balance between independent and competing power sources is a fundamental ideological assumption of free market economics and is essential for the protection and enhancement of creativity and spontaneous social order.

My normative position against current trends in urban development is not one that seeks to exclude government from a public role in the urban development market. Rather, it is a position which seeks to limit the definition of that role so that the state does not become the pervasive and undisputed source of power in the urban marketplace. My normative position allows government to act when doing so by general rules when there is market failure in the private sector and when the action is necessary to preserve human dignity. A lawyer's obligation is to engage in a continuous dialogue on these points.

The requirement to act by general rules is merely one that seeks to eliminate discretionary outcome specific results that can lead to political abuse and the destruction of liberty.³⁹ The requirement of market failure is merely a recognition that the government should not be spending and risking public resources on real estate projects adequately provided by the private marketplace.⁴⁰ Similarly, the requirement that the government act only when essential to preserve or enhance human dignity is merely a recognition that the purpose of government is to protect those who are less powerful from those who are more powerful, and *not* the reverse. This last factor is both a moral position and an economic position. It is this very process that preserves counterbalancing power sources, competition, and the benefits that flow therefrom.

Examples of the types of activities that I believe government should be doing if government is to engage in a co-financing and public/private partnership agenda include providing low-income housing, job training, and housing for the homeless. Such programs are the reason we have government, to assure that the basic needs of all people are met. Even Adam Smith can be read to support such a role for government.⁴¹ We should not form governments merely to have them fund shopping centers, restaurants, and office buildings, because these are the kinds of projects that private developers have always provided and continue to provide. There is nothing essential to human dignity nor anything relevant to a homeless and unemployed person that will be accomplished by a city's desire to get a Saks Fifth Avenue or a Neiman Marcus located in a downtown shopping center. Our ideological drift with respect to the way

38. See MALLOY, SERFDOM, *supra* note 1, at 30-37.

39. *Id.* at 53-60.

40. *Id.* at 113-39.

41. *Id.* at 16-29.

we engage in the *process* of urban development through planning, zoning, and financing has led us to this perverse and exploitive use of the public purse and trust.

The study of law and economics allows us to come to an understanding that law and legal relationships embody ideological assumptions concerning economic and political arrangements. In their distinctive form and structure, both law and economics can be viewed as a discourse concerning the allocation of power and resources within society. I have studied urban development and revitalization efforts under American law and have discovered an ideological drift away from individual rights, private property, and the virtues of a competitive marketplace. In its place I see the emergence of a new age of serfdom: an ideological serfdom embodied in a discretionary exercise of state power, the emergence of a disbelief in individual rights, and the destruction of counterbalancing power sources as a result of blurring the distinction between the public and private sphere.

If Ye Are Privy To Thy Country's Fate, Oh Speak: An Answer From Robin Paul Malloy's *Planning For Serfdom* and Classical Liberalism In The Tradition of the Scottish Enlightenment

WILLIAM F. HARVEY*

We cannot say "the past is the past" without surrendering the future.

Winston S. Churchill
House of Commons, March 14, 1938

Juliana Geran Pilon, writing about an award of the Medal of Freedom by President George Bush to Professor Friedrich A. Hayek, who received the 1974 Nobel Prize in economics, quoted Czechoslovakia's minister of privatization, Mr. Thomas Jezek, who said:

If the ideologists of socialism would single out the one book that ought to be locked at any price and should be strictly forbidden, its dissemination and lecture carrying the most severe punishment, they would surely point to [Friedrich A. Hayek's] *The Road to Serfdom*.¹

There is another book which the ideologists of socialism ought to lock up. It is Professor Robin Paul Malloy's, *Planning For Serfdom*.²

This time, however, the American socialists are better protected. Their first defensive barrier is not their control of university departments, schools, and administrations, or their huge influence in America's book review literature, or its mass visual or print media. They have natural allies, who are unnatural in the social order. These are the managerial elite, or the "public entrepreneurs." They "move and shake" cities, communities, families, schools, universities, and destroy the morality which arises from a spontaneous social order — the social order which their corrosive conduct first defaces and then dissolves. The managerial elite has millionaires, created by the Department of Housing and Urban

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1. Juliana Geran Pilon, *A Great Man — and a Great Idea*, WALL ST. J., Nov. 18, 1991, at A16.

2. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

Development and state and municipal funding programs, elected officials in municipal, state, and federal offices, a river of favorable print and visual media, very powerful and political law firms, accountants, experts, social planners, and an excellent cover: sports and games for the taxpaying public.

What the managerial elite does not have is "values." Values which come from the natural social order, from which also comes the individual's freedom and dignity. Professor Malloy has these values. He understands them. He expresses them. His major opponents are not the varieties of socialists. They really cannot compete against Malloy. His opponents, who protect the socialists, are the elite managers, or the "public entrepreneurs."

Malloy writes about both groups. He concentrates upon the managerial elite of the American cities, and upon Indianapolis, Indiana in particular. The socialists will read and understand that in Malloy they have a "main enemy" (one of their favorite expressions). The public entrepreneurs will not read Malloy. These persons read their statutes, their rules, and regulations, which make them the rich and powerful special class of whom James Burnham wrote in 1941. A class distinct from the legal owners of the instruments of production and detached from responsibility to citizen-taxpayers on whom they impose burdens, duties, and massive debt. This time the socialists have more protection.

This review and comment uses Professor Malloy's words to explain the great concepts of law, economics, politics, and social philosophy which he expresses. His words appear throughout either as direct quotations or in accurate textual use (full sentence and paragraph) or paraphrase, except when the reviewer's thoughts are inserted and expressed.

I. THE SOCIAL CONCERN AND PROBLEM: ACADEMICS, INTELLECTUALS, OFFICE-HOLDING FUNCTIONARIES

In rejecting a natural rights discourse, liberal, CLS and conservative philosophies deny the fundamental reference point of the individual as the creative foundation for freedom. In its place they offer their own distinctive brand of "higher consciousness" which informs their own particular conception of authority.³

Professor Robin Paul Malloy is a very well informed economist and professor of law. This alone makes him unique, but there is more. He

3. Robin P. Malloy, *Toward a New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27, 56 (1991) [hereinafter Malloy, *Discourse*].

is a teaching academic who believes in values,⁴ and that liberty of the individual is among the highest values. There is, he states, a natural or spontaneous social order which will protect and advance the dignity and freedom of an individual.

In today's American legal-academic establishment, Professor Malloy is a rare professorial item. I postulate that if one might make a random selection of 1,000 professors of law from American law schools in 1992, there might be fifty who would seriously explore, without previous political commitment, the meaning which Malloy develops in his use of words such as "liberty," "freedom," and "individual," and his explanation of Smithian morality, economics, and social and political philosophy. These fifty souls would need protection before they would come out from under the ice.

With *Serfdom*, Professor Malloy establishes himself as: (a) one of America's keenest analysts of Adam Smith, and Classical Liberalism from the Scottish Enlightenment; (b) the clear leader in a legal-educational field which is called, "Law and Economics," which he seizes and takes away from others; (c) an essayist of the first magnitude on urban redevelopment in contemporary America; (d) a leading advocate of "liberty" and of those sustaining social values which are independent from "wealth-maximization" and "economic analyses of law"; and (e) a powerful exponent of general rules which restrain special interests, and ideological interests in particular. Professor Malloy is an excellent writer. This volume might be the basis of an entire law school course.

It follows that several persons will not be pleased with this work. Among them are:

1. Judge Richard Posner, on the United States Court of Appeals for the Seventh Circuit, and a chorus of academic Posnerettes who dance to a tune called "economic analyses of law."⁵
2. Mayor William H. Hudnut, III, of Indianapolis, Indiana (who left office on January 1, 1992) and former Indiana Governor Robert Orr.

4. Law and economics does not, therefore, concentrate on analyzing, by economic methods, the efficiency of numerous legal rules generated by a given society. Rather, the primary goal of law and economics should be to investigate how certain values or principles will be affected by changing a community's current social, political, and economic arrangements.

Id. at 32.

5. Judge Posner and Professor Malloy are not cordial antagonists. They show hostility in their continuing debate. See MALLOY, *SERFDOM*, *supra* note 2, at 164-67 & nn.10-19; Malloy, *Discourse*, *supra* note 3.

3. Members of the boards of directors, and their officers, of an assortment of public corporations and private foundations in Indianapolis and Indiana, (and in other cities, too).⁶
4. Several "Urban Development Assistant Grant" (UDAG) and Municipal Bond Millionaires in Indiana and in other American cities and states.⁷
5. A few writers employed by *The Indianapolis Star*, *The Indianapolis News*, and *The Washington Post*.⁸
6. A group of persons who function inside legal education, in a field called "Critical Legal Studies."⁹

6. Several are listed in Robert N. Bell, *Public, Goldsmith Reviewing Use of Money to Promote City*, INDIANAPOLIS STAR, Dec. 22, 1991, at A1, A8-A9, which is printed in Appendix 1.

7. In several places, Professor Malloy discusses UDAG grants. See MALLOY, SERFDOM, *supra* note 2, at 113.

8. An extensive and supportive article about Mayor William H. Hudnut, III, in *The Indianapolis Star*, indicated that he "created an image that's had us hooked." John R. O'Neill, *The Hudnut Legacy*, INDIANAPOLIS STAR, Sept. 1, 1991, at F1 [hereinafter O'Neill, *Legacy*]. *The Indianapolis News* ran a five-day set of articles about Mayor Hudnut, by a competent writer, Kathleen M. Johnston. The first was printed on the evening of Christmas Day, 1991. Kathleen M. Johnston, *Hudnut Was Can-Do Mayor of Can-Do City*, INDIANAPOLIS STAR, Dec. 25, 1991, at A1. This was, perhaps, intended as a late Christmas present to the taxpayers of Indianapolis, because the third article in the series carried a headline saying "[Hoosier] Dome to be Shrine for Hudnut Success." Kathleen M. Johnston, *Dome to be Shrine for Hudnut Success*, INDIANAPOLIS STAR, Dec. 27, 1991, at A1. If so, the Hoosier Dome is a rather large icon. A very favorable article about Mayor Hudnut appearing in *The Washington Post* on November 23, 1991, is discussed in footnote 65.

9. Professor Malloy is, in fact, very fair in his analyses of the Critical Legal Studies group and an assortment of related persons and groups, who do receive much time and much printers' ink in American law reviews. MALLOY, SERFDOM, *supra* note 2, at 50.

My opinions about the persons who subscribe to the Marxist philosophies asserted in the Critical Legal Studies movement are captured by Paul Hollander. He writes a superb review of a great book, *Utopias Elsewhere: Journeys in a Vanishing World*, by Anthony Daniels (Crown, 1991). Daniels, an English psychiatrist and writer, visited Albania, North Korea, Romania, Vietnam, and Cuba, between April 1989 and January 1990. Daniels makes penetrating observations about Western intellectuals, including his fellow tourists. He commented about their conduct at a ceremony honoring Kim Il-sung in North Korea: "There was no external compulsion for these people to behave as they did, to abandon their critical faculties, to lose their identity, to be united in a pseudo-mystical union with a hundred thousand people of whom they knew . . . absolutely nothing." They were people who displayed "one of the besetting sins of Western intellectuals . . . [the] envy of suffering, that profoundly dishonest emotion which derives from the foolish notion that only the oppressed can achieve righteousness." Paul Hollander, *Days of the Iron Curtain*, WASHINGTON TIMES, Dec. 17, 1991, at F4.

7. The powerful special interests which have major influences in state and federal legislatures, and the executive branches of government in the United States.¹⁰

10. See Kathleen M. Johnston & Douglass T. Davidoff, *Taxes Paying One-Third of Sports Corp. Costs*, INDIANAPOLIS NEWS, Oct. 31, 1991, at A1. The journalists state that the Indiana Sports Corporation, which hosts "dozens of amateur sporting events, including the 1987 Pan American Games, was founded in 1979. Sports Corp. helped the city earn an international reputation as a leader in the business of hosting sporting events." *Id.* The Sports Convention is funded by the City of Indianapolis which will give over \$650,000 in taxpayer's money to it in 1992. The money is pledged by the Indianapolis Convention & Visitors Association (ICVA), a public agency. The first "public agency" to fund the Sports Corporation for 1992 was the Capital Improvement Board (CIB), which has paid the Sports Corp. \$150,000 annually since 1983. The CIB operates the Convention Center and the Hoosier Dome, and it has promised to make payments to the Sports Corporation until 2003. CIB also funds much of the budget of the ICVA, and the latter's budget for 1992 is \$4.3 million of which two-thirds comes from CIB's tax receipts. This article describes a Michael Browning, a local real estate developer and chairman of the Sports Corporation, who said that public subsidies are appropriate: "I think the business we bring to the community every year is extraordinary," and "I can't imagine we're not earning our keep." *Id.*

Later public analyses suggest a different imagination. See Patrick Morrison, *CIB May Face Million-Dollar Shortfall*, INDIANAPOLIS STAR, Jan. 22, 1992, at A1. Morrison states that the shortfall is due to fewer travelers, a losing season for the Indianapolis Colts football team, lower attendance at their games, and a slowdown in restaurant business. Morrison states that officials became concerned when they saw these developments:

- The hotel-motel tax collection dropped in 1991 by \$11,686.
- Revenue from the Colts games and other professional sports at the Hoosier Dome fell by \$46,000.
- Food and beverage tax revenue fell short of its expected increase by over \$200,000.
- Other similar reports.

Id. This means, we are told, that if the Indianapolis trends continue, the money which the CIB would receive in 1992 would fall "\$1.25 million to \$1.75 million short of what was projected." *Id.*

The 1992 budget for the Capitol Improvement Board is \$25.8 million. Of this, \$3.4 million is dedicated to the Indianapolis Convention & Visitors Association. The Association uses this money, Morrison states, to "market and promote Indianapolis for conventions and tourism." *Id.*

Others are concerned with the thought whether, as Mr. Browning put it, the CIB is "earning our keep." Another article in *The Indianapolis Star* states that the Indiana House of Representatives passed a measure which would divert up to \$5 million annually from the Capital Improvement Board to a state fund to be used for economic development in all of Marion County, Indiana. Dorothy Petroskey, *House Passes Bill to Divert \$5 Million from CIB*, INDIANAPOLIS STAR, Jan. 25, 1992, at A1. The bill's supporters in the Indiana House said that the legislation is needed because of complaints over how the CIB has allowed tax money to be spent. One House member said that some of the tax money given by the CIB to the Indianapolis Convention and Visitors Association was used for memberships in country clubs for the Association's executives and a contest to

8. All collectivists, whether eighty-ton Lenin-Marxists;¹¹ British Socialist Lords and Ladies of the Tony Benn variety; German Socialists such as Hitler and his assorted criminals; American Hollywood Liberals and Leftists; Maoists; Religious Liberationists in Latin America; Righteous Educationalists throughout the United States; old and new Lincoln Brigadists; or Enver Hoxha, Kim Il-sung, Fidel Castro, Nicholae Ceausescu, Gus Hall, Erich Honnaker (whether in Germany, Russia, or Cuba) and their many kindred spirits.¹²
9. Many Deconstructionists, and especially the reconstructing deconstructed deconstructionists.¹³

promote a convention. This House member questioned whether the foundation of economic development is found in the golf game of the Association officers and officials and in paying their dues and fees. This article states that the bill's opponents are confident of removing this measure when the bill reaches the Indiana Senate. *Id.* at A4.

11. For over 100 years the socialist-marxist community has assailed the conspicuous wealth of "those rich capitalists." This is a commonplace among them, whether referring to a large gingerbread house in 1892 or a large expensive car in 1992. "Tonnage" gives the socialist-marxists their due recognition in return. It refers to their conspicuous and perhaps only real creation: their work of art. This is impressive military tanks. The higher the tonnage, the greater the socialist. An "80-ton Lenin-Marxist" stands very high in the Order of Socialist Knights of the Tank.

12. Malloy refers to this kind of mind in the context of the words "Politically Correct" and persons who would exercise hegemony over alternative and conflicting views. "Such a view, however, merely replaces one historical tyranny with another, suppresses one illegitimate hierarchy with a new one, eliminates one form of political, economic and legal hegemony only to promote a new one." MALLOY, SERFDOM, *supra* note 2, at 52-53.

13. Serious comments about Deconstructionism may be found in comparing Robin P. Malloy, *Signs of The Times — Law and Semiotics*, 65 TULANE L. REV. 211 (1990) with Peter Shaw, *The Rise & Fall of Deconstruction*, 92 COMMENTARY 6, 50 (Dec. 1991). The Shaw article states that one of the Godfathers of Deconstruction had an earlier history of support for the Nazis in Europe.

Himmelfarb, a famous historian states:

Another intellectual fashion that is sweeping the [academic] herd may seem to be at cross purposes with [the new] determinism, but actually complements it neatly. This is the philosophy of deconstruction. Where race/class/gender is clearly deterministic, deconstruction would appear to be (and in some contexts is) so undetermined, so unstructured, as to be nihilistic. * * * It is ironic, and pathetic as well, to see these bold, free spirits coming to this doctrine not even second-hand but third-hand, and precisely at a time when it has become passé elsewhere. American literary critics took over deconstruction from the French, just as the French began to abandon it. And now American historians are adopting it from their literary colleagues, just as the latter are becoming defensive about it (in part because of the unsavory disclosures about the antisemitic, pro-Nazi past of one of the most revered leaders of that school, Paul de Man).

Gertrude Himmelfarb, *A Letter to Robert Conquest*, 4 ACAD. QUESTIONS 44, 45 (1991).

10. Senator Joseph Biden, Chairman of the United States Senate's Judiciary Committee, who will, we may confidently expect, wave Professor Malloy's book at some hapless court nominee, and make him or her swear that this book will never be read, or cited in a federal judicial opinion as long as the person sits on a federal court.

Malloy's Concern About "Governor Isuzu" and "Mayor Superdome"

Malloy states that a body of knowledge is available which creates and then sustains the spontaneous social order, and that this knowledge should be known and understood by persons who exercise political power. If they do not know and do not understand, then they will establish the conditions in which freedom is extinguished. They will direct the community of persons into an unwanted and unexpected serfdom.

This means, implicitly, that it is economically inane for an officeholder to refer to himself as a "Governor Who Goes to Japan to Get Hoosier's Jobs," a favorite theme of former Indiana Governor Robert Orr, or a "Mayor Who Creates Jobs." Neither person creates anything of the kind. But each is quite capable of creating the social conditions in which there is no social spontaneity, no constraint upon the state and its favorite organs of power which benefit selectively enriched persons and organizations, no capital-creation, no city sustaining import-replacing production, no new employment centers or activities (as distinguished from expensive, publicly-funded employee and employment-transfer centers), and fewer and fewer jobs.

In their place, a Governor or Mayor and the special interests might provide for lots of swimming, diving, bicycling, tennis, jogging, football, basketball, sweating with bulging jugular veins and flared nostrils, corporate jogging competitions, and world-class games without lions to devour the contestant who does not win a medal, flags, pennants, and heavily-greased fast food from vendors which sell a gulp and a slurp to all observers. These activities are led by "very public persons." They float in an ocean of compassion and empathy. This is displayed in the daily press or on "talk-radio programs," or on television (always with the "concerned pose," which at Christmas, or Hanukkah, or when retiring from office, is superimposed upon a panoramic view of the city's skyline with its assortment of new, posh hotels, which are not filled, or office buildings, which have many vacant rooms and corridors.)

This inundating public compassion omits recognition of the standards and criteria which alone sustain good schools, safe parks and streets, and clean, disease-free facilities where persons may recreate in a community in which there is individuality and respected equality. It cannot recognize them. These standards and criteria are derived from the spon-

taneous social order, which the "job-providing" office holder, funded with a deluge of federal and municipal and foundation cash, has all but destroyed. This is Professor Malloy's concern about conditions in the United States.

His concern arises from a remarkable understanding and explanation of the organized economic knowledge which sustains the spontaneous social order. This is Classical Liberalism identified in Smithian Economics, properly understood and explained. He applies these principles to Urban Development, U.S.A. His principal example is Indianapolis, Indiana. He has, thus, two books in one. Actually, there is a third book here, which addresses Comparative Political and Social Theory. It or they are a great read and would be cheap at twice the price.

II. THE SOCIAL CONCERN AND PROBLEM: INDIANAPOLIS, THE EXAMPLE

"But God Never Made Little Green Apples, And This Book Ain't Read In Indianapolis At Anytime."

This volume's theory of law and economics discloses the new serfdom. This new serfdom is illuminated by a specific examination of urban planning and development. Professor Malloy states that late twentieth century America is preoccupied with the public rather than the private; with planning rather than spontaneity; with material projects and objectives rather than spiritual triumphs. As a result the American social order drifts into static quagmires sustained by statist ideology. Planning sustains the assertion of political over economic means. This leads to an age of serfdom, or a condition in which, again, personal status and managerial hierarchy rather than individual talent, creativity, and human dignity, become the measure of one's worth, identity, and personality.¹⁴

In *Serfdom*, there is no assertion of a conspiracy against an individual or persons. There is no Marxist/Communist/Socialist claim of inevitable class struggle with its terror-by-committee system, and the social and economic ruin which that postulation generates and has established. Among these pages, one does not find the extreme Leftism of the British MP, Tony Benn. This is not a Vladimir Pozner or Phil Donahue splashing their infinite sound bite wisdom upon the American television public.

Malloy, a student of Adam Smith, Friedrich A. Hayek, and Milton Friedman, is exactly the opposite. His intellectual distress comes from the transformation of the legal and economic discourse in which new millionaires and their political office-holders speak freely "of public/private partnerships, co-financing, and mutual cooperation in urban

14. MALLOY, SERFDOM, *supra* note 2, at 1.

planning.”¹⁵ They validate norms which are antilibertarian (anti-individualist), which reject natural rights, and ultimately destroy the delicate societal balance “necessary for the preservation of the creative [social and economic] discovery process.”¹⁶ As a result, individual liberty in the classical liberal sense and in the sense of the founding of the American Republic is destroyed. It is replaced with a conception of liberty for the community or liberty for the state. In the community’s liberty and in the state’s liberty, the individual and freedom disappear.

Implicitly Malloy maintains that the immediate threat to liberty and to the individual’s unique development is a “Manager of Co-Financing,” who brings sports stadia to the city or state. A sea of sports entertainment deflects attention away from the expert who is summoned to plan and manage the seemingly anarchistic marketplace.

In return, the individual is provided with a less creative, less expressive, and less dynamic environment in which personal political connections replace formerly impersonal market exchanges. The transformation is profound. It puts power into the hands of the state, which, by virtue of its monopoly on the coercive exercise of public power, presents a far more devastating risk to individual liberty than any perceived weakness in the operation of the free market [or in an immediate threat of a new Gulag].¹⁷

The key to understanding the serious threat which Malloy describes emerges in the recognition of commercial monopoly. His perception of the monopoly is refreshingly different from the economist who sees only inefficiency. He tells us that although

some legal economists argue that monopoly is bad because it is inefficient and it does not make good use of scarce resources, I [argue] that monopoly is fundamentally harmful because it lacks a sufficient counterbalancing power source. Monopoly, in a metaphorical sense, embodies the problems of the unlimited state, wherein individuals are subject to the whims or despotism of the sole exerciser of power.¹⁸

15. *Id.* at 4. In a slightly different setting, Malloy observes, “In this interactive process, however, it is the power to name, the power to organize and describe ideas, the power to structure the way we talk about ideas that gives signifiers power over that which is signified.” Robin P. Malloy, *Introduction to the Symposium*, 42 SYRACUSE L. REV. 1, 4 (1991) [hereinafter Malloy, *Introduction*].

16. MALLOY, *SERFDOM*, *supra* note 2, at 127.

17. *Id.* at 128.

18. *Id.*

His argument is much more. It is a careful explanation of social forces which always should be encouraged and sustained because they establish a social equilibrium. This condition permits personal development, and creative spontaneity in the social order. It permits a legal system which sustains all persons, because there is an economic climate in which they may function. It is called a "free-market economy."¹⁹

Economics, we are told, is a process and a discourse. It is best understood within the bounds of a particular discussion and with reference to specific examples. For this reason, urban development is examined. Malloy's analysis of urban development is not meant to be a detailed treatment of real estate development, constitutional law issues, or financial programs which establish a new shopping mall, dozens of restaurants and sporting facilities.

The subject of urban development "serves as a point of reference for conducting a dialogue on the proper relationship between law, legal institutions, and economics."²⁰ Indianapolis, Indiana is used as an example because (a) Malloy is very familiar with the city, (b) the impact of \$1 billion is greater in Indianapolis than in a larger and more diversified city such as New York or Chicago, and (c) its political and economic ideology (in the rhetoric) is more defined and cohesive than in the more pluralistic and factional politics of a larger city.²¹

"The Amateur Sports Capitol of America" "You betcha, we have our own 'West Side Story' on the West side of downtown Indy."

Indianapolis is a city of about 1,200,000 persons in central Indiana.²² It comprises eighty-four percent of Marion County's population.²³ In the 1970s and early 1980s, the city experienced a serious decline in its

19. Malloy has observed that,

Hayek tells us that freedom emerges in, and is protected by, the marketplace because the metaphorical marketplace allows individual creativity to blossom through the spontaneous interaction of innumerable autonomous people. It is the dynamic and autonomous nature of the free marketplace that allows us to be free. Freedom for Hayek and other classical liberals is the product of a spontaneous social order that emerges in a fluid environment of infinite, independent exchanges, each informed by community understandings of the value and boundaries "set" by such exchanges.

Malloy, *Introduction*, *supra* note 15, at 215-16.

20. MALLOY, *SERFDOM*, *supra* note 2, at 2.

21. *Id.* at 5.

22. *Id.* at 103 (citing Richard L. Forstall & Don Starsinic, *The Legal U.S. Metropolitan Areas*, *URB. LAND*, Sept. 1984, at 32-33).

23. *Id.* (citing Rita J. Bamberger & David W. Parham, *Leveraging Amenity Infrastructure — Indianapolis's Economic Development Strategy*, 43 *URB. LAND*, Nov. 1984, at 12-18).

commercial and industrial base.²⁴ This experience was very similar to other cities in the nation's "Rustbelt." Between 1970 and 1980, Indianapolis lost about 45,000 residents, and in the three years between 1979 and 1982, the city lost 35,000 jobs in the private sector.²⁵ Despite this decline, Indianapolis continued to pursue active downtown investment and a redevelopment strategy based on the construction program designed to house (a) pleasure-stimulating sporting events, and (b) office buildings, hotels, restaurants, and their supporting facilities. Between 1974 and 1986, approximately \$1 billion was invested in sports facilities and related downtown projects. The downtown business district alone had some forty office, retail, hotel, and related housing projects.²⁶ This occurred because persons who controlled the city's government were willing to engage in and foster public/private partnerships, through which the city became the developer, equity partner, or landlord for almost all of the major downtown projects.

Redevelopment activity placed millions of taxpayer dollars at risk in real estate projects.²⁷ It put millions of dollars into the income accounts (but not necessarily taxable income) of selected developers, lawyers, accountants, financiers, urban planners, public and private officials, and other persons to whom much power was given if they would but agree with the overall activity.²⁸

All of this occurs inside a lavish public relations program which has no boundary. The program sells "can do" rhetoric of free market capitalism, rugged individualism, and appeals to conservative *Republicans and Democrats*. It is city boosterism which proclaims the major accomplishment of the city planners, and movers and shakers, to be the relocation of the Baltimore Colts football team from Baltimore to Indianapolis.²⁹ There is more, however. When Mayor William H. Hudnut,

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 104, 107-08. Malloy cites to articles which indicate that, possibly, several million dollars in Indiana University fees were diverted into construction activities because they were municipal-supporting.

28. *Id.* at 104-07. Open, public discussions are provided. They are shown, in part, in the exchange printed in the Indianapolis magazine, *C.E.O.*, set out in Appendix 2.

29. *Id.* at 109. See also John R. O'Neill, *Sports Put Indy on the Map*, INDIANAPOLIS STAR, Sept. 1, 1991, at F4. "Since 1976, \$168 million in new sports facilities have been built, the Hoosier Dome being the biggest and most expensive. As a result, the city [was] host to at least 230 sporting events, including the 1987 Pan Am Games." *Id.* The city spent \$77 million to build the Dome and expand the Indiana Convention Center. "There is just no substitute in the economic development field for the kind of stature that major league sports give a city," the Mayor said in his speech. *Id.* There were several reasons the Baltimore Colts moved to the Amateur Sports Capitol of the World, O'Neill wrote.

III, left the office on January 1, 1992, the *Indianapolis Star* reported that his name appeared on "30 roadside signs . . . on the outskirts of Indianapolis, . . . [and] on 112 signs in city parks. . . ." ³⁰ Clearly, Malloy might suggest, this man of the people is not to be forgotten. But "Mayor Bill" is not alone. Malloy tells us that:

Spearheaded by seed money from the Lilly Endowment and augmented by various private and public resources, many Indianapolis real estate projects owe their existence, not to the work of an elected body, but to the behind the scenes efforts of the City Committee. The City Committee was apparently established in the late 1970s and only became public in 1989. . . .

. . . .
. . . The City Committee consisted of about thirty successful male executives, and their task was to plan the future of Indianapolis without exposing their role or presence to public scrutiny. By design or by mere coincidence, the members of the City Committee were the politicians, Lilly Endowment officers, real estate developers, contractors, bankers, lawyers, and other professionals who eventually became primary actors in receiving, directing, and managing various public/private enterprises.³¹

Malloy makes very serious claims about this kind of private/public merger, or monopoly. There is irony, he says, in that the echoes of this kind of city boosterism overwhelm the voices of displaced persons who have lost their homes through condemnation or other cheap purchase, and the unemployed remain unemployed.

In addition, this kind of public/private cooperation destroys the appropriate balance between public and private power sources, which destroys the creative process of and the environment for freedom.³² The

"Among them are: The Colts' 20-year lease with the dome — a sign of commitment to the city. The Colts get the first \$500,000 yearly income from the Dome's luxury suites. The rest goes to the Capital Improvement Board, which oversees the Convention Center, the Dome and Market Square Arena. The board will receive an estimated \$1.48 million in 1992." *Id.* The O'Neill article points out that on April 27, 1981, the Indianapolis City-County Council approved a one percent tax on food and beverages sold in county restaurants. The tax will pay off the \$40 million in bonds funding the Hoosier Dome and the expansion of the Indiana Convention Center. Excess money from the tax is applied to the operating expenses of the finished complex. *Id.* See also Morrison, *supra* note 10 (strongly suggesting that these tax-to-pay for sports programs seem to be turning into financial ashes).

30. John R. O'Neill, *City Will Show Few Signs of a New Mayor for a While*, INDIANAPOLIS STAR, Jan. 1, 1992, at A1.

31. MALLOY, SERFDOM, *supra* note 2, at 108-09.

32. *Id.* at 109.

political success of the Indianapolis programs is based, we are told, on the transference of identification. This process reduces or eliminates individuality by focusing identity on crowd participation.³³ This focus permits the transformation of very important ideological values, in order to validate the emergence of the complex interrelated legal and economic arrangements of the public/private partnerships engaged in urban reconstruction.

The net result, we are told, is that "numerous taxpayers with diverse interests contribute to subsidy programs directed to identifiable and cohesive special interest groups."³⁴ Malloy likens the city itself to a special interest, and advises that the city represents the political vehicle for the expression of the political interests of its key and controlling constituents. In urban development, these persons are politicians and business persons.³⁵ *Cui bono?* Clearly, he says, they may be known.³⁶

The immediate losses in the Indianapolis feeding frenzy are substantial, he says. First, the co-financing activities allow numerous direct and indirect wealth transfers between citizens and taxpayers. This means wealth is transferred from taxpaying persons to rich special political and economic interests. Second, the indirectness of the methods used to achieve this wealth transfer makes it very difficult to obtain good information on the actual costs and benefits of government involvement in co-financing activities, and difficult to measure the real gain and loss in special interest condemnation programs, or the real beneficiaries in acts and programs of targeted subsidies. Third, the political allocation of scarce resources favors the allocation of resources to the established city and to the status quo. More importantly, perhaps, Malloy advises that the use of political means to allocate economic resources does much more than simply transfer wealth from poorer to richer persons: "To the extent that political means redirect the investment and resource allocations of the marketplace, there is a net social loss in economic activity because scarce resources are no longer used for their most valued and, therefore, most efficient purposes."³⁷

Most alarming is the destruction of individual freedom and dignity or the core of Classical Liberalism, as an end-state objective. Elsewhere Malloy states that,

capitalism, free markets, and neoclassical economics are supported to the extent that they are seen as societal constructs

33. *Id.* at 110.

34. *Id.* at 114.

35. *Id.* at 115.

36. Bell, *supra* note 6, at A1. See also Appendix 1.

37. MALLOY, SERFDOM, *supra* note 2, at 116.

that support the enhancement of a specific idea of freedom. The market, neoclassical economics, and capitalist social organization are not the ends to be achieved, they are merely the means to another more important end. That end is individual liberty and freedom.³⁸

Malloy is in full agreement with the distinguished economist Israel Kirzner, and with Jane Jacobs, whom he cites.³⁹ They and he say that the true measure of wealth under capitalism and Smithian Economics, and the true measure of economic development is its unleashing of a creative process of discovery and the spontaneous social order. They permit natural genius and its social benefit to arise. This is not related to highrise office buildings, sports centers, corporate joggers, wealthy developers, Mayors, Governors, Ambassadors, U.S. Senators, or games, games, games. Wealth under capitalism is infinitely greater than all of those things combined because it permits a social spontaneity and a natural creativity which the minds of the "movers and shakers" and their committees and planners cannot anticipate or imagine.

Malloy and Jacobs say that regardless of how well-intended the government grant of economic power might be, and regardless of the frequency with which smiling officials are paraded before the public, the process of urban rebuilding will be more successful if achieved by the spontaneous interaction of individuals, rather than attempts to plan and to purchase specific capital goods and developmental outcomes.⁴⁰ This is because individuals, acting for their own benefit, will benefit all in the city or community. In ways which both attract and generate, they will build the goods and services, and reconstruct older capital commitments. This process means that they will have goods and items and ideas with which to trade to persons whose goods, items, and ideas they import for their own use. This creates a truly prosperous import-replacing community with a prosperous creative and interactive process of discovery. This is vastly different from merely enticing a transplant industry with cash gifts from the municipality, or the state, which does not sustain long-term wealth creation and urban development.⁴¹

Malloy (and Jacobs) gives other examples. He shows that the Tennessee Valley Authority (TVA), despite the investment of tremendous amounts of "government money and resources," did not stimulate the

38. Malloy, *Discourse*, *supra* note 3, at 70.

39. MALLOY, *SERFDOM*, *supra* note 2, at 118 nn.13 & 18 (citing JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS* 93-124 (1984)).

40. *Id.*

41. *Id.* at 119. For a discussion of the United Airlines deal, so to speak, for the City of Indianapolis, see *infra* note 44.

emergence of "an import-replacing city."⁴² He explains that the transfer of Lockheed of Los Angeles to northern Georgia and the Atlanta region added nothing more than service and distribution functions to the Georgia area. He says that,

the current range of urban development . . . hardly seems worthy of the task at hand. The subsidized development of downtown office buildings and hotels, or the desire to preserve historic structures by turning them into fast food and retail centers, is hardly the type of activity likely to bring forth long-term gains for a local city economy.⁴³

Obviously, these authorities do not believe that the recent Indianapolis, Marion County, and State of Indiana gift of \$500 million to United Airlines, to entice its transfer of an \$800 million maintenance facility to the Indianapolis Airport will provide long-term gain and wealth creation to Indianapolis, or to Indiana.⁴⁴

Malloy comments that the use of political means to allocate limited resources, rather than the economic means of the market, is self-perpetuating for the special people and their interests, who have captured the power of the state for their own benefit.⁴⁵ Once special interests seize the power of condemnation, non-Euclidian zoning, and co-financing — whether in the form of acquisition, development, and construction assistance (ADC assistance),⁴⁶ or in the form of tax-related assistance

42. MALLOY, SERFDOM, *supra* note 2, at 120.

43. *Id.* at 121.

44. Indiana and Indianapolis were the successful bidders for an airport facility to be constructed by United Airlines in Indianapolis. The initial public comments speak about a \$1 billion facility, with 6,300 well-paying jobs by the year 2004. Mayor William H. Hudnut, who left office January 1, 1992, is quoted as saying on the day of the announcement, "I haven't been this choked up since the day I walked across the floor of the Hoosier Dome with Bob Irsay [the apparent owner of the Indianapolis Colts professional football team]." Brice C. Smith, *City Gets United Repair Center*, INDIANAPOLIS STAR, Oct. 24, 1991, at A1. See Douglas T. Davidoff & Terry Horne, *Air Hub May Cost \$523.3 Million*, INDIANAPOLIS NEWS, Oct. 30, 1991 at A1. Luring United Airlines' maintenance base to Indianapolis will "cost far more than Gov. Evan Bayh and Mayor William H. Hudnut announced a week ago." *Id.*

See also Jon Swantes & Kathleen N. Johnston, *United Deal Done With Words and a Handshake*, INDIANAPOLIS NEWS, Oct. 30, 1991 at A1. The taxpayers are committed to the \$523 million package and unlike other taxpayer-funded projects to buy private industry, such as the Subaru-Isuzu Automotive deal, this money goes directly to United Airlines, and not for the construction of sewers, roads, and drainage systems. Moreover, a \$130 million penalty clause was waived for United Airlines, and there is some uncertainty about the high-paying jobs said to be available by 2004.

45. MALLOY, SERFDOM, *supra* note 2, at 43.

46. *Id.* at 99.

as in tax abatement, or enterprise zones, or tax increment financing, or bonds, or rent control, a group of bureaucrats, technocrats, consultants, and writers emerge. They spend their time, and much money, dealing with the regulations which must exist as a platform for the activity. In turn, they acquire an intense vested interest in maintaining the special interests which originally seized or obtained the intrusive power of the state. Malloy observes that this "success does truly breed success."⁴⁷

Malloy's argument, his great concern, is not limited to the failure which the short-term fix produces (after the persons who create the failure have left their offices). His main focus is not the requirement of a steady and constant infusion of more and more imported cash and goods in order to prevent immediate collapse, adverse public comment, and special-interest qua mass-media generated unrest. There is something

47. *Id.* at 43. There is evidence which sustains Malloy's claims and fears. Indianapolis real estate brokers and developers commented upon the United Airlines deal, another West Side Story [the Indianapolis airport facility is located on the west side of the City]. "The Westside is expected to reap the most development because of its nearness to the United facility. But the highway system's quick and easy access to other parts of the city means the benefits will spread across Indianapolis," said Jim Litten, the president of the residential division of a major Indianapolis real estate selling company. Another, Tom Mullen, director of marketing for another major real estate marketing organization, agreed. But the latter observed that the outlying counties, not part of the City of Indianapolis, and perhaps not part of their principal marketing area, would be required to improve their sewer capacity to handle this new development. Eileen Ambrose, *United Hub to Have Spinoff Effect*, INDIANAPOLIS NEWS, Oct. 24, 1991, at B1.

These authorities did not have the benefit, it seems, of an article entitled, *Travel is Off, Airlines Ailing, but Projects Just Keep Expanding. Boosterism and Bonds Fuel Projects Even as Estimates of Need Are Scaled Back*, WALL ST. J., September 26, 1991, at A1. This article states that the airline industry is reeling from record losses in 1990, which forced 12 major carriers to file for Chapter 11 bankruptcy. Apparently this was not considered in the Indiana full-court press coached by team leader Mayor Hudnut to give a half-billion dollars to United Airlines to bring its maintenance center to Indianapolis. There is a worse-case scenario: this might have been considered by the coach and his team.

Meanwhile, an earlier commitment of huge city funds for the reconstruction of the "downtown," called the "Circle Center" project (or similar names) for the creation of a large covered shopping complex in the center of the City, another achievement of Mayor Hudnut's teams and administration, seems lost in the large holes in the ground in "downtown" Indianapolis, where solid buildings once stood, and in the announcement of the closing of a major retail store, L.S. Ayres & Co. L.S. Ayres had a 119-year-old tradition, but was closed because it "was not productive, it wasn't making money and we don't see any turnaround." Jo Ellen Sharp, *L.S. Ayres Will Close Downtown Location*, INDIANAPOLIS STAR, Oct. 26, 1991, at A1.

The new 1992 Mayor of Indianapolis, Stephen Goldsmith, states that in the years 1990 and 1991, the "city has spent about \$20 million more [each year] than it has received." The deficits were made up by taking money from the city's cash surpluses, but this surplus will expire early in 1992. Patrick Morrison, *City Faces \$15 Million Budget Deficit, Mayor Says*, THE INDIANAPOLIS STAR, January 29, 1992, at 1.

here of much greater moment. It becomes a bright-line issue and question, even if its presence is not discussed in the daily print press or by television oracles.

"The ideological implications of such efforts and a normative evaluation of these methods are [the] important concerns of this book."⁴⁸ There is a very substantial ideological significance in urban revitalization efforts, and Malloy's critique asks the reader to consider the underlying values which are being transformed and contorted in order to achieve a short-term, localized benefit.⁴⁹

The surge of special interest, large-cash activity in Indianapolis represents the transformation of the structure and the content of the legal economic discourse, and the destruction of the critical tension between private and public zones of power and economics. The liberty of persons and freedom's institutions depend on this tension. This is, he states, a real and detrimental effect on the humanity of the society in which we live, and upon Indianapolis, Indiana.⁵⁰

Malloy is a dedicated classical liberal theorist. He and classical liberalism find no comfort in the economic discourse of "public choice theory," which is the predicate for the actions taken in Indianapolis and in other cities. This theory and its effectuation establish short-term programs which impose identifiable short-term interests of a few over the broader long-term interests of the many. He recognizes, however, that opposing special-interest economics and politics in Indianapolis or at any place will have "transaction costs that far exceed" the benefit to the person who makes the effort.⁵¹ ("Transaction costs" is a scholar's way of describing the broken careers and broken heads of those persons who might make the effort.)

Moreover, classical liberal theory does not agree with economic theory which establishes wealth-maximization and economic efficiency as an end-point. Classical liberal theory understands those kinds of economic discourse, but rejects their end-state objectives and predictions "as inappropriate social discourse."⁵² Indeed, in this volume Malloy's rejection of each is total. It is searing. He takes no prisoners. He knows that the stakes are very high. He does not want a social collapse in America which might be similar to the inevitable collapse of the Soviets in 1991.

Classical liberal theory promotes more important and more "fundamental than end-state norms"⁵³ which, translated for Indianapolis,

48. MALLOY, SERFDOM, *supra* note 2, at 102.

49. *Id.*

50. *Id.* at 111.

51. *Id.* at 41.

52. *Id.* at 40.

53. *Id.*

means athletic stadia and games for all. Malloy strongly defends the political and economic theory which sustains "individual liberty, human dignity, and freedom as creative and spontaneous processes of individual social evolution" and its cognate uplifting spirit and condition.⁵⁴

Malloy explains this way:

The dynamics of this process are significant for our prospects of freedom versus serfdom. One of the great attributes of the modern capitalist age has been the departure from a world of status to an impersonal world of contract and markets. Capitalism has made a more egalitarian society possible precisely because one's abilities rather than one's status is the key to success in the marketplace. On the other hand, the expanding use of the political means threatens the egalitarian principle of equal opportunity by returning us to an age of title, status, and connection as the means to power or success.

In the dawn of this new age of serfdom, not only do we find incentives for people to invoke political means, we find that those who fail to invoke political means may be hindered in the attainment of their goals. Thus, there becomes a market for state power and a tendency to overgraze in this market. A conspiracy is not needed in order to allege an alignment of special interests that works against the fulfillment of others' aspirations. . . .⁵⁵

His book is compelling because he provides a magnificent explanation of Smithian Morality, Social Structure, and sustaining Economics. He gives, in short, a definitive analysis of Classical Liberalism, from which he clearly separates Public Choice theory, and the theories of Wealth-Maximization.

III. THE ECONOMICS OF LIBERTY: SMITHIAN ECONOMICS

*Those tempted to think economics is divorced from moral laws have neither read Adam Smith's "Theory of Moral Sentiments" nor stopped to think how value-laden the terms "goods" and "services" are.*⁵⁶

Malloy, a remarkably honest academic, states that economics and law are affected by the ideological perspective or commitment which

54. *Id.*

55. *Id.* at 43-44.

56. Warren Brooks, *Ultimate Gift of Enduring Value, Goods and Services*, WASHINGTON TIMES, Dec. 25, 1991, at F1 (commentary).

one holds. This affects the structure of legal economic discourse and its content. He does not use mathematical or econometric models to analyze empirical data about urban development. His inquiry follows law and semiotics. Economics is a creative process of discovery, and "it is a structured process of discourse which concerns the appropriate relationship between individuals, the community, and the state."⁵⁷

Thus, market theory economics establishes boundaries for discussion. These are: (1) the central role and function of the individual; (2) the correctness of individual empowerment and decision making; (3) the importance of balancing sources of power, so that an ever-changing creative process might be stimulated; (4) clear recognition that self-interest is incompatible with selfishness; and (5) understanding that the economic form of classical liberal discourse is primarily concerned with the promotion of individual liberty and freedom as an *end*, and thus that capitalism or free-market economics is a *means* to the ends which are individual liberty and freedom; they are not *ends* themselves. This means that economic classical liberalism is *very different from* concepts of "scientific" efficiency or wealth maximization, a la Judge Richard Posner, and others; (6) that classical liberal theory includes recognition of a natural rights discourse, and that several claims relate to a conception of human dignity — claims which, today, are grouped inside the word, "welfare"; (7) recognizing that prior distributions of wealth may not meet the standards of classical liberalism, and are subject to constant reconsideration; (8) understanding that general rules of law and of the social order are preferred, and that they constrain — certainly in the Constitutional Law of the American Founders — outcome-specific rules, and their conspicuous products which are the huge special interests of these times; and (9) understanding that the universe around us, meaning the personal and economic actions of all persons, is never fully knowable, which means (10) that no group of experts, planners, committees, boards, or socialist apparatchicks can plan and control the creative and spontaneous energies of countless individual decision makers.⁵⁸

Malloy explains that Classical Liberals are neither "liberals" nor "conservatives" as these terms are used at the end of the twentieth century. "Classical Liberal" derives from the Scottish Enlightenment, and the tradition identified with Adam Smith and David Hume. It is espoused by such notable contemporaries as Friedrich A. Hayek, Milton Friedman, Thomas Sowell, Ludwig von Mises, Murray N. Rothbard, Walter E. Williams, and Benjamin A. Rogge, Jr., among others of substantial prominence. Understanding Classical Liberalism requires a

57. MALLOY, SERFDOM, *supra* note 2, at 3.

58. *Id.*

foundation in the writings of Adam Smith, and an examination of his work in *The Theory of Moral Sentiments*, *Lectures on Jurisprudence*, and *The Wealth of Nations*.⁵⁹

In Chapter 3, Malloy provides an outstanding summary of Smith's theories in these works. He points out that Smith had a much more complex view of the relationship between law and economics than many persons realize. He was, first, a moral philosopher, and then a philosopher of political economy. He did not detach his views from his interdisciplinary background. To him, democratic government and a capitalist economy were seen as a means for achieving a higher purpose. They were not merely ends in themselves. The value of the division of labor, of capitalism, of material well-being, of law and of government, always is measured by the degree to which it successfully harmonizes his principal concern, which is individual liberty and the morality of our moral sentiments.⁶⁰

Liberty, Smith said, was the one essential ingredient of the good life. It is the one element which satisfies people and makes them equal. It acquires meaning, however, only in a social context, and the need which each person has for all others in the social community. Accordingly, Smith strongly denounced selfishness, and with equal strength, separated it from self-interest. The latter embodies a concern for living with others. Harmonizing individual liberty with social function and cooperation is Smith's theory of moral sentiments. Smith offered a subjective model of human conduct. It suggests that a community of persons view others and themselves on the basis of how they think others view them, from the perspective of the impartial spectator. He allowed an individual to use his or her best efforts in pursuit of personal fulfillment, constrained only by fair play and community and justice. Smith never postulated a selfish survival of the fittest with individuals acting to maximize their own wealth and success. Smith saw the social order comprised of persons who act within the guidelines of social norms which they establish among themselves, which means that individual merit is contingent and dependent upon the merit — happiness — of others. Thus, his theory of moral sentiments and his bases for morality were founded, he wrote, in our natural sense of propriety and merit arising from experience. The general rule is formed by finding from experience that all actions of a certain kind or manner are approved or disapproved.⁶¹

General rules in the democratic social order, those on which a majority would agree, can be maintained only to the extent that they

59. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS, LECTURES ON JURISPRUDENCE, AND THE WEALTH OF NATIONS* (1966).

60. MALLOY, *SERFDOM*, *supra* note 2, at 29.

61. *Id.* at 23.

are known by almost all of society's members. Clearly this means that the twentieth century democrat would have difficulty understanding Smithian principles, because the principles would be confused with majority rule or legislative majoritarianism. Neither meets the Smithian test of generality. Today's sea of special interest legislation in the regulatory state fails the test, utterly.

Malloy says that for Adam Smith the general rules, which the informed majority establish, constrain and restrict the ability of the special interest to create and control by self-serving rules. Today we call these rules statutes and regulations. Smith knew this, and anticipated it. For him, the first purpose of civil government was protection of individuals from the coercion of others. But the democratic process alone is not sufficient to protect individual liberty, if government, in the form of the state or its many subalterns such as committees, councils, and commissars, is able to act in the same coercive fashion as the power elite, and as special interests would act in the absence of government, or do act when they control it.

Preventing government from being a mere substitute for coercive individuals or private entities involves the creation of a power sufficient to constrain governmental power. Malloy advises that Smith envisioned a process of checks and balances between individuals and their government. This requires that extensive sources of capital be in private hands. This creates the critical tension between the state's assertion of power and a power able to restrain the state. In this relationship, liberty and individual dignity are assured and will flourish.

Without a commitment to a strong private sector as a counterbalance to the public sector, the power of the state is unlikely to be adequately restrained.⁶² If this relationship does not exist, the pervasive intrusion of state planning, state regulation, and the increasing reliance on the political rather than the economic means for the allocation of rights and resources in our society occur.⁶³

The forces promoting the use of political means are strong. Politicians, governmental, corporate, and public sector bureaucrats are rewarded with the indicia of power and respect more frequently when they exercise political power on behalf of special interests than when they refrain from action. This gives politicians an opportunity for self-actualization by invoking legislation, or decision-making power (regulations), which promotes and imposes their perceived wisdom, insight, and programmatic changes upon those of others.⁶⁴ This results, Malloy

62. *Id.* at 37.

63. *Id.*

64. *Id.* at 35.

informs us, in the tragedy of treating state power as a "free good" which, when successfully harnessed by a person or by a group, permits either to have a great advantage over its competition. Because the operatives of the state are not reluctant to expand the "good works" of the state [Do you have tickets to the city's subsidized professional football team, in the city-financed new superdome?], there is a tendency of every individual to conclude that they, too, should do something to invoke the power of the state on their behalf.⁶⁵

According to Smith and Smithian economics, general rules of morality are not divinely ordained. They emerge from self-conscious individual introspection by persons who live and pursue their self-interest in the society of others. Thus, individuals do not always act to their own advantage. They are constrained in the pursuit of their own self-interest by their moral sentiments. When they act in their self-interest and create, the act is not selfishness, and it is beneficial to the whole. The benefit may not be intended, just as a person cannot anticipate all of the effect

65. *Id.* at 36. There is a kind of art in this. It involves the image of sacrifice. "I'm only thinking of you," as in the words of a song. An extensive article in *The Indianapolis Star* about Mayor William H. Hudnut indicated that he "created an image that's had us hooked." See O'Neill, *Legacy*, *supra* note 8, at F1.

The Indianapolis Star has shown concern about 16 years of the reign of Mayor William H. Hudnut, III. It wrote against the recommendation of a new court building, which was recommended by a non-elected "review" committee, after the Indianapolis mayoral elections in 1991. (Neither major party candidate discussed the project. Each candidate was a person of substantial public integrity, and it is quite probable that neither person knew that a "review" committee would make the recommendation.) The *Star* editorial writer said, in part:

Taxpayers must surely be flabbergasted by all this. Just days before the building authority study was released, the city formally assumed its share of the huge United Airlines deal when \$140 million in bonds went on sale. The city is already in debt up to its ears due to the stalemated Circle Centre mall.

The economy is in a prolonged slump and social welfare budgets are skyrocketing. *A Court's Building*, INDIANAPOLIS STAR, on Dec. 26, 1991, at A12 (editorial).

A very favorable article about Mayor Hudnut appears in *The Washington Post*. See Michael Abramowitz, *Midwestern Revival in 'India-No-Place'*, WASHINGTON POST, Nov. 23, 1991, at A3. The article concludes that Hudnut lost a 1990 state-wide election to become Indiana's Secretary of State because his Democratic opponents, "tarred him for a series of tax increases in Indianapolis." *Id.* Hudnut is quoted: "I paid a price, a big price last year in terms of all but destroying my political career . . . [but] I still think that what I did was right. . . ." *Id.*

A later article in *The Indianapolis Star*, December 20, 1991, suggests that the "big price" which Mayor Hudnut paid for the taxpayer-financed commitment to sports, new office buildings, a downtown shopping center, and an airport maintenance facility, has received more than token repayment. The article states that the Indianapolis Economic Development Corp. will employ the former mayor as its chairman and CEO at an annual salary of \$150,000. John R. O'Neill, *Hudnut Gets Job Bringing Business to Indianapolis*, INDIANAPOLIS STAR, Dec. 20, 1991 at A1.

or good which an initial act will produce. When this occurs, the person's act and creation functions as an "invisible hand" making a distribution to others of the necessities of life.⁶⁶

Moreover, government may function here, because it should protect individual liberty, and it should provide for those traditional activities, such as roads and basic services, which are important to material well-being and are not profitable for private persons. Smith accepted government as an administrator of justice, a provider of police protection, and of military services and security. He would allow government to function and to provide when the marketplace does not, and this is against the background of equality among all persons. The poor, he said, are as worthy as the rich, and he insisted that adequate educational opportunity be provided.

Smith rejected the "social contract" theory of relationship between individuals and the government. He said that the relevant basis for evaluating government's performance is not an alleged contract, but the appropriate norms, moral sentiments, and morality upon which human interaction and individual liberty are based.⁶⁷

Accordingly, wealth-maximization, economic efficiency, and personal recognition according to an arrangement of hierarchical assets or "power positions" is the very opposite of Adam Smith, and Classical Liberalism. Malloy instructs that Smith and classical liberalism are quite different from modern Posnerian Conservatism, the modern Liberal, and Left Communitarian and their approaches.

IV. JUDGE RICHARD POSNER'S CONSERVATIVES, THE LIBERALS AND LEFT COMMUNITARIANS OR MARXISTS

*The traditional political, social, and ethical ideologies that served premanagerial society — individualism, classical liberalism, constitutionalism, states' rights, personal moral responsibility, etc. — will not serve the managerial elite.*⁶⁸

Professor Malloy takes strong issue with the economic-analysis-of-law conservatives who are led by the writings of Judge Richard Posner.

66. MALLOY, SERFDOM, *supra* note 2, at 151.

67. *Id.* at 27-29. Professor Malloy's analysis of Adam Smith is strongly supported by other scholars and writers. Adam Meyerson, in an excellent and brief analysis of Adam Smith, claims that the rudiments of an ideology of "welfare state capitalism" can be found "in the most moving elegy to economic freedom ever written, Adam Smith's *Wealth of Nations* in 1776 . . . [which] also made the case for a number of government programs." See Adam Meyerson, *Adam Smith's Welfare State*, 50 POL'Y REV. 66 (1989). This Smithian analysis is too brief to explore Malloy's main point which is that Smith's economic philosophy and analyses are the basis of individual freedom which is their end-point, and that they are subordinate to the freedom they assist in creating.

68. Samuel Francis, *Prophet Sustained*, 16 CHRON. 1, 15 (1992).

Because of Malloy's classical liberal concern with individual liberty, he strongly challenges the dogmatic manner in which Posnerian conservatives employ a neoclassical economic method and model as an end in itself. He explains and challenges the major assumptions of Posnerian conservatives, and the values which sustain their claims. They offer, he says, a view of law and society which is centered around the status quo, and a free-market system as an *end* in itself. Posner's conservatives reduce all rights to numerical calculations and then proceed to balance countervailing claims by means of scientific equations. The thrust of their argument is that an efficient result will maximize wealth, and that wealth maximization produces the best attainable social arrangement. For them, there are no inherent individual rights. Any result that is dictated by the pretensions of scientific calculations is used to justify the treatment of individual rights.⁶⁹ The Posnerian conservative approach uses the image of science, and purports to decide issues rationally and objectively without consideration of morality or of social norms that may be counter to its pseudo-scientific methods. This results, Malloy alleges, in the validation of laws and legal institutions which favor persons already in possession of a disproportionate share of society's political and financial power. The outcomes generated by the conservatives with a Posner stripe favor the power of the state and the groups it will sustain. This process rejects the humanistic principles of economics first established by Adam Smith. Smith's philosophy, unlike Posner and his wealth-maximization constructs, includes recognition of natural rights, human dignity, and certain welfare rights for all members of society.⁷⁰ The Posnerian approach will marginalize and extinguish our conscious participation in moral and humanistic decision making. These approaches, these Posnerian assertions, are conservative, we are told, because they are grounded in, and continue to promote biases which favor prior distributions of wealth, power, and resources.⁷¹

From the Posnerian influenced politicians comes the cry: "We must rebuild the inner city." Or, in Indianapolis, "We have our own West Side Story in the construction programs found on the west side of the downtown area." In all of this moving and shaking, there is nothing more than reorganizing the past because this activity has no creative spontaneity of any kind. In buying and subsidizing the Indianapolis Colts, and their Hoosier Dome, the Indianapolis movers and shakers forced the taxpaying public to purchase an idea which was at least fifty years old. This is not a Silicon Valley or a city administration which is hospitable to new ideas.

69. MALLOY, SERFDOM, *supra* note 2, at 66.

70. *Id.* at 68-69.

71. *Id.* at 70.

Liberals' and Left Communitarians' approaches are more openly subjective and less scientific in their claims than the Posnerettes. All are in accord with Posner, when they reject the concept of an individual's natural and inalienable rights. The Left argues that such a conception of the individual stands in the way of progress in social welfare programs, because too often these conceptions are used to protect the wealth, resources, and positions of people in power.⁷² The Liberal perspective replaces natural rights with a requirement of equality of treatment.

Liberals resolve conflicts of competing claims by appealing to the political process rather than the marketplace. Equality of treatment is deemed necessary to assure protection for individual rights, given a democratic political process with a broad-based participation. In this conception, the state, when pursuing community goals, can legitimately do whatever it wants. The political should protect the individual, but there are no natural rights limitations on the activities the state can undertake. Malloy recognizes some of the major flaws in this kind of twentieth century Liberalism. It ignores the dynamics of special interest influence over the political means. It puts too much power into the hands of those who control the machinery of the governmental process. "In essence, the liberal approach elevates the myth of democratic institutions to the level of legitimizing those actions of the state directed by a liberal statesman."⁷³ We are given this summary:

The liberal economic discourse presumes equality of outcome, a rejection of natural rights, and a rejection of neoclassical economic market justification of resource distribution, and it elevates the political process to center stage in resolving pressing social problems. [Liberal economic discourse] incorporates the assumption that experts are best able to understand and address pressing social problems. . . . [This] conception of legal economic discourse . . . shifts the ideological framework away from Chicago School and Posnerian economic analysis and delivers us into the Keynesian world of market failures, insurmountable transaction costs and externalities, and the need for liberal intervention and management of social institutions for the common good.⁷⁴

The Left Communitarian, or the Socialist or Neomarxist ideologies are discussed, and distinguished from the Liberal. Socialists allow some private property, but use the power of taxation and other forms of state

72. *Id.* at 70-71.

73. *Id.* at 71.

74. *Id.* at 73.

seizure to remove the separateness which is required to make the private sphere a counterbalancing power source to the state.

Marxists seek communitarian ownership, and they are more clear about the consequences of their philosophical vision.⁷⁵ They would place ownership of the means of production in the community, represented by the state, and eliminate the private sector as a base of power. Under this system of analysis the vast array of public goods and resources are by necessity required to run the state in a way that will best serve the needs of "the people." This requires an ability to both know and implement the "best decisions" for everyone in the society. Because this is not possible, the marxist state acts in terms of generalities, and thus must fulfill by its action an ideological vision of class consciousness as opposed to individual self-realization. Because the state owns or controls all significant resources in the marxist system, it is very difficult for it to move in any direction which is contrary to the ideological agenda of people in power.⁷⁶

This permits an observation not declared, but suggested in Malloy's thoughts. When radical socialists attempt to control the social order and individual liberty, then the Gulag Archipelago, Dachau, Treblinka, or Auschwitz, those final solutions and rancid deposits of radical, collectivist doctrine, will appear in a land or nation in which there is no Anglo-American common-law inheritance endowed by the Scottish Enlightenment. Malloy's implicit concern is whether they might appear in a land which has this inheritance and this enlightenment.

Malloy explains the Critical Legal Studies (CLS) movement in American legal education. It is a neomarxist view of law and economics. It views existing law and institutional structure as contingent and socially chosen. From this platform, CLS claims that it can demonstrate the bias in our process of social choice and that this bias reflects class struggle and exploitation. Law and legal discourse are envisioned as an attempt to make current social, economic, and political arrangements appear natural and thus, legitimate. The immediate task of the CLS movement is to "unmask and remove" the current legal order, so that it may raise or impose a new consciousness ("a new social order" as Lenin once said) concerning political choices confronting society. Malloy then discusses the CLS distinction between "rules" and "standards." He says that to engage in this left or neomarxist form of discourse and economics is to promote values antagonistic to traditional neoclassical economics and classical liberal concerns for the individual.

In this book, Malloy identifies CLS and its associated groups. In the main, he is analytical and not judgmental about them, their notions,

75. *Id.*

76. *Id.* at 74.

and their declared purposes. In another publication, Malloy is more specific: "CLS presumes that marxist determinism is the ultimate authority; that class conflict and the communal march of historical destiny require a rejection of individualist thinking, the upheaval of current law and legal institutions, and the deliverance of society to the control of pure political power."⁷⁷

An expression about CLS thoughts is offered in an article by Mr. Irving Kristol.⁷⁸ He surveys Socialism in the twentieth century, and earlier. Kristol begins saying that "it is not a cliché to say that the most important political event of the 20th century has been the collapse of the communist regimes and of the socialist idea on which they ultimately rested."⁷⁹ Then he comments on the intellectuals who desperately attempt to distinguish one from the other. About them and their notions he states:

But political ideas do not have any such Platonic or other worldly status. They live and die in history. They are what they become. It makes no sense to say that such-and-such a political idea turned out badly because human beings mishandled it, or misinterpreted it, or because circumstances conspired against it. If those ideas cannot withstand human mishandling or unforeseen circumstance, they are more accurately described as political fantasies rather than realistic political ideas.

That has been the natural destiny of socialism: A political fantasy incarnated into a reign of terror, a historical nightmare from which humanity has now awakened. But awakened to what?⁸⁰

Malloy provides a brief and keen analysis of the Libertarian School, and he discusses the more prominent works of Robert Nozick, and Richard A. Epstein. In reply, he distinguishes Classical Liberalism. He states that the purpose of the state is to "counterbalance the private sphere with the public sphere, and that only in the emergent equilibrium

77. *Id.* at 75-76; Malloy, *Discourse*, *supra* note 3, at 56. Malloy is exactly on the mark in this statement about the legal educationalist CLS group. Theirs is the empire of "pure political power," as Malloy states. Malloy seems to make the point that the CLS group, if given political power, would imitate their late Soviet friends, whether Lenin or Stalin and their KGB. And why shouldn't they? Those Russian Marxists/Leninists had their slave empire and their death camps in which millions upon millions died. The American Marxists/Leninists and their ilk surely are entitled to have theirs too, are they not? I mean, fair is fair!

78. Irving Kristol, *Vision of the Capitalist Future*, WASHINGTON TIMES, Jan. 3, 1992, at F1 (commentary).

79. *Id.*

80. *Id.*

of this balance can individual liberty and human dignity emerge and encompass the greatest measure of personal autonomy and human worth."⁸¹

This means that classical liberalism is a philosophy that does not believe in capitalism or the free market for its own sake. It is a philosophy that puts paramount value on freedom and individual liberty as the ultimate objective, with capitalism and the free market identified as the best means for achieving and maintaining that objective. This philosophy believes that the capitalist idea and the fulfillment of individual liberty have not yet been achieved. As a result, all law and social policy claims which seek justification on the basis of prior or current political and economic arrangement, are subject to a critical review in light of the moral imperative to protect and advance freedom and individual liberty.⁸²

V. THOUGHTS AND OBSERVATIONS FROM THE REVIEWER

Serfdom is beautifully reasoned and expressed. Malloy writes with genuine fairness to persons who are totally antagonistic to him and will inflict substantial harm or retardation upon him whenever possible. Malloy's tradition is that of Friedrich A. Hayek's *The Road To Serfdom*.⁸³

One may read Malloy and pause. An image appears. It is a classroom on a warm summer afternoon. Upstairs with windows open, a professorial voice floats above drowsy heads which look outside at the tops of gently waving trees. In that room, however, there are two or three students who fully understand that the lecture they hear describes the very essence of the liberty and dignity they enjoy. They consume it. They never forget it. Reading Robin Paul Malloy causes me to think that, years ago, he was one of those two or three students, and that he had one or two great professors. This is all that's needed for a mind such as his.

Malloy is an academic. His use of words which fit the academician and the economist, such as "grazing" or "over grazing" and similar expressions, is delightful. He creates unintended humor because the conditions and the philosophies which he describes are utterly violent in their approaches to each other and to him. But his words, or his kind of academic detachment, seem not to sufficiently notice. This is pleasant and refreshing.

My principal criticism of *Serfdom* and Malloy concerns his failure to make distinctions between *economic* and *political* conservatives, and

81. MALLOY, *SERFDOM*, *supra* note 2, at 78.

82. *Id.* at 50.

83. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

among their respective philosophies and the persons who advance them. Malloy's failure here is conspicuous, and leads to the thought that he knows his enemies but not his friends. In a sentence, if there is a distinction between Bruce Ackerman and his writings on liberal theory, and the Marxist CLS group, which Malloy explains, then he should be able to make distinctions between Richard Posner as an economic conservative and Russell Kirk as a political conservative.

Malloy is very critical of the Reagan Administration's policies, and those of former Indianapolis Mayor William Hudnut or former Indiana Governor Robert Orr because they were not what they said, or were not consistent with their rhetoric. They spoke about public entrepreneurship instead of urban socialism when there was no significant difference. They use, he states, the phrase "public entrepreneurship" because it invites little or no consideration of its values which are contrary to the accepted notions of individualism and free market capitalism.⁸⁴ Malloy blandly assumes that Posnerian *economic* conservatism defines *political* conservatism in contemporary American events and discourse, and that there was no distinction between them inside the Reagan Administration. These two philosophies and their persons violently opposed each other across the entire spectrum of the Reagan Administration.

Initially, *political* conservatism created and defined the Reagan Administration, and it and they were remarkably successful. They correctly claim the collapse of the Soviet Empire as causally related to their philosophical and personal efforts. They established the policies which created excellent economic conditions across the United States. Later, they were ruthlessly replaced by the regulatory statist, or those *economic* conservatives whose only program is office-occupancy preceded by cute slogans such as "read my lips."

An example of the absence of these distinctions appears in Chapter nine, entitled "Comparative Ideology." He is contrasting classical liberalism to the fascist world, especially of pre-World War II. Into this he injects a comment upon the contemporary *political conservatives'* distrust for the American mass print and visual media. He suggests that this is not consistent with other politically conservative positions. He adversely comments on Lt. Col. Oliver North; he says that political conservatives are concerned about restrictions upon police conduct, but do not have similar concerns about individual rights of an accused.

This does not assist his cause because he is incorrect. It tends to isolate him from powerful minds who are political conservatives and who would agree with almost all of his analysis of classical liberalism. I suggest that a political conservative such as a Russell Kirk, a Thomas

84. MALLOY, SERFDOM, *supra* note 2, at 85.

Fleming, a William F. Buckley, Jr., a Paul Craig Roberts, an Edward B. McLean, or a William B. Allen among many others, would rail against Malloy for attempting to move from Malloy's criticism of Judge Richard Posner and a statist, neofascist economics into a broader criticism of political conservatism as Kirk and many others define it. Moreover, there is a certain naivete in Malloy's comments here, or just a simple absence of observation of current events. He seems not to comprehend that a reasonable judgment of Lt. Col. Oliver North, and many other persons like him, is that they are the true victims of a philosophy of government function, and of persons who enforce it, which is determined to create criminality in the conduct of all persons who disagree with it or with them.⁸⁵ For these governmental bureaustatists, the "economic

85. There is a substantial belief that criminalizing public policy issues and disputes has been the main congressional suit for years, and that it is a major effect of the swirling, violent politics occurring before and after Watergate in the 1970s. Among the serious writers on this subject is L. Gordon Crovitz. See L. Gordon Crovitz, *Lecture Topic for Abrams: Special Prosecutors and Legal Ethics*, WALL ST. J., Nov. 20, 1991, at A17 (book review); L. Gordon Crovitz, *Special Persecutors*, WALL ST. J., Nov. 20, 1991, at A16 [hereinafter Crovitz, *Special Persecutors*] (editorial about the funds and the conduct of Mr. Lawrence Walsh, the prosecutor of Lt. Col. Oliver North, Adm. John Poindexter, Mr. Elliott Abrams, and as many others as Walsh might find).

Mr. Abrams was a high official in the State Department during the Reagan Administration. The Crovitz article states that on the day that a federal appellate court dismissed Mr. Walsh's case against Lt. Col. North, Walsh "needed a scalp to keep his multimillion-dollar operation going. Mr. Abram's would do." Crovitz, *Special Persecutors*, *supra*, at A17. The crime which was at last revealed to Mr. Abrams was in his 1986 testimony to the Congress. In answer to a question, Mr. Abrams told a congressional committee that the "attitude of the [Reagan] administration is that the Contras are doing a very good thing" in opposing the Sandinistas in Latin America. *Id.* The federal judge who received the plea-bargain imposed a sentence in which Mr. Abrams is to lecture "other lawyers on legal ethics" for 100 hours. *Id.* As Malloy might say, in his delightful academic word choice, if not jargon, the "transaction costs in challenging the status quo can place the challenge beyond reach."

To my mind, there is historical analogy available in England. It occurred not long after Adam Smith wrote. It was provided by the Secret Committee of the Lords which was established to persuade Liverpool to agree to introduce a Bill of Pains and Penalties if Queen Caroline was proved guilty of adultery. This produced much expensive litigation, legal precedent which is cited to this day, remarkable evidence, a hold upon the English public's attention, ruined careers of splendid public officials, and eventually, the acquittal of Queen Caroline. Afterward, Caroline was granted an annuity of \$50,000 which, Churchill states, "she was not too proud to accept." WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES, THE GREAT DEMOCRACIES* 21 (1958).

I suggest that it is not likely that the grant-giving Congress of the United States will place an equivalent annuity of about \$130,000 upon Lt. Col. North, Adm. Poindexter, or Mr. Abrams, although their virtue and their innocence, one may argue, are greater than Queen Caroline's. Moreover, the public issues in which they were involved were much more complicated and vastly more important than the Queen's alleged love affair

discourse'' of which Malloy speaks may be conducted in a jail cell.

A series of articles by Woodward and Broder in *The Washington Post* about Vice President Dan Quayle states that the Vice President has "infuriated critics such as Rep. Henry A. Waxman, D-Calif., chairman of the House Energy and Commerce Subcommittee on health and environment."⁸⁶ Waxman has accused Quayle of "setting up 'an illegal shadow government.' In an interview, Waxman compared . . . Quayle's 'rogue operation' on the domestic front to the Reagan administration's secret maneuvers uncovered in the Iran-Contra investigation."⁸⁷ Waxman does not merely disagree with Vice President Quayle. He sees him as a criminal.⁸⁸ Of course he does. Waxman is an elected governmental bureaucrat in its purer form. He and his kind own the U.S. "House of Representatives."

Malloy should "wise up" because this jackbooted attitude plainly appears in the American legal academic establishment in which he functions. My friend Alexander Bickel has been dead for almost twenty years, and much of what he represented and we enjoyed in the American academic community — an open pursuit of facts and ideas in a community of informed scholars, followed by a testing of academic propositions and scholarly positions by persons who are free from preceding commitments which are little more than nihilistic incantations and dogmatic self-aggrandizing personal fads or leftist cults — seems to have died in that time, too.⁸⁹

with an Italian Nobleman. Of course, the Queen, her Nobleman, and King George IV might disagree with these opinions. For relevant readings about Congressional criminalization of policy, see Arnold Beichman, *Martyr of a Power Struggle*, WASHINGTON TIMES, Oct. 11, 1991, at F3 (commentary); *Poindexter's Nightmare*, INDIANAPOLIS STAR, Nov. 20, 1991, at A10 (editorial).

86. See Bob Woodward & David S. Bradon, *Quayle Goes to Bat for Business*, INDIANAPOLIS STAR, Jan. 9, 1992, at A1.

87. *Id.* at A8.

88. In the process, Quayle has infuriated critics such as Rep. Henry A. Waxman, D-Calif., chairman of the House Energy and Commerce Subcommittee on Health and the Environment, who has accused Quayle of setting up "an illegal shadow government." In an interview, Waxman compared what he called Quayle's "rogue operation" on the domestic front to the Reagan administration's secret maneuvers uncovered in the Iran-Contra investigations. "The Council on Competitiveness has usurped power, holds secret meetings with industry groups and violates administrative procedures on public hearings and public access to information on decision-making," Waxman said. *Id.*

89. A letter from Gertrude Himmelfarb to Robert Conquest contains this thought: Your Soviet friend, Bob, throwing off the shackles of Marxist determinism, must marvel at the readiness of his American comrades (or former comrades) to embrace, voluntarily and with forethought, this new determinism. He may also marvel at the sight of so many liberated souls mouthing the same slogans (computers all over the country must be programmed to produce race/class/

I would hope that Malloy would directly treat others in this work, but their absence is not a suggestion of deficiency. One person who comes to mind is Mr. James Burnham, and his profound work, *The Managerial Revolution: What is Happening in the World*.⁹⁰ Samuel Francis provides this comment on and analysis of Burnham's work:

The theory of the managerial revolution as Burnham formulated it in 1941 holds that Marxism is correct that capitalism, in the sense of privately owned and operated business enterprises seeking profit, is historically in decline. It disagrees with Marxism that what is replacing capitalism and the society capitalism created is a socialist order in which the proletariat will rule. Instead of socialist revolution, Burnham argued that the managers of large corporate firms were beginning to form a new ruling class and they would merge with similar groups in the modern bureaucratic state. The result would be an order in which the state and the economy would be "fused." Formal nationalization of the means of production might or might not occur, but the reality, apart from the formal and legal arrangements, would be a monolithic concentration of power in the hands of the dominant managerial class in state, union, and corporation. . . . The managerial interests are served by collectivist and social rationalist ideologies that de-emphasize the individual, the personal, the local, and the particular and champion the collective, the impersonal, and the universal. . . . The triumph of such managerial ideologies is due not to the decadence of traditional beliefs and those who adhere to them but to the rise of a new social group in the form of a managerial elite that sponsors and promotes them in its own interests.⁹¹

My hunch is that Malloy would agree with this analysis of Burnham, and would say that this is today's social order in many localities such as Indianapolis. It is for this reason, I suggest, that Malloy writes, and will continue to do so.

He writes to identify, and to preserve the monumental values which sustain the individual in a cloak of dignity. He writes to explain that the managers of post-capitalism, and post-Marxism, those "movers and

gender with a single stroke of the key) and a professing to rebel against the establishment while they themselves occupy the commanding heights of the establishment. (Was it Harold Rosenberg who coined that wonderful expression, "the herd of independent minds?").

Himmelfarb, *supra* note 13, at 44.

90. JAMES BURNHAM, *THE MANAGERIAL REVOLUTION* (1960).

91. Francis, *supra* note 68, at 15, 17.

shakers of downtownism,” those UDAG millionaires, obliterate the fountainheads of their existence and ours. They destroy those tender criteria, those inherent standards, those delicate rules of moral order and achievement which create excellence in the independent institutions which sustain the social order. These institutions may be either “private” or “public” in a sense of funding and ownership and contemporary American Constitutional Law. It really does not matter. What counts is the independence of the standards and the criteria which daily they use, and which are quite separate from the institutions. The existence of natural and spontaneous criteria and standards are to social institutions as the sound from the tuning fork is to a musical instrument. These standards know quality and principle, creativity and perpetuity, propriety and virtue. They are not material, and may not be bought. They are the social estate which comes from the natural spontaneity in a non-managerial, non-marxist, non-Posnerian society. This estate is our greatest inheritance, our freedom, our dignity, our all.

In Robin Paul Malloy, the spontaneous social order and freedom-loving persons have a powerful advocate, a brilliant economist and writer, a fine law professor, and a gracious person.

APPENDIX 1.

Robert N. Bell, *Public, Goldsmith Reviewing Use of Money to Promote City*, INDIANAPOLIS STAR, Sunday, Dec. 22, 1991 at A1, A8-A9.*

They have operated in virtual secrecy for years.

Yet these five private organizations charged with helping to promote the city of Indianapolis receive millions of your tax dollars.

And now they face the glare of public scrutiny because for the first time the public — and government agencies — are taking a close look at how they spend the money they receive.

Also taking a special interest is Mayor-elect Stephen Goldsmith, who is reviewing all aspects of city government, including its promotional effort.

The five agencies are the Indianapolis Convention & Visitors Association, the Indiana Sports Corp., the Indianapolis Project, the Indianapolis Economic Development Corp. and the Commission for Downtown.

The Indianapolis Star studied the operation of these organizations after an Indiana Supreme Court decision declared their spending records open.

That review found:

- They spent \$6.89 million last year, and \$3.68 million of that was tax dollars.

- The agencies pass money among themselves. In fact, the organization with the largest budget gives some of its money to two of the other groups without any accountability to the public.

- The five separate agencies have some similar duties, but those involved argue vigorously that combining them would not be a good idea.

Not a unique system

Providing tax money to private organizations is not unique to Indianapolis. Columbus, Ohio, a city of comparable size and population, provides tax money to promote the city.

David Bush of the Legislative Research Office of the Columbus City Council said the city provides \$4,125,000 to private organizations such as the Columbus Chamber of Commerce, Downtown Columbus, the Columbus Sports Corp. and the Columbus Countywide Development Corp.

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The majority of the funding here comes from the city of Indianapolis, either through its Department of Metropolitan Development or the Capital Improvement Board. Also providing money are the Indiana Department of Commerce; the Corporate Community Council, a private group made up of city business executives; and Lilly Endowment.

Those in charge of the organizations believe the taxpayers are getting a good return on their investment. But Goldsmith is not prepared to agree — at least not yet.

He wants to see a complete analysis of all the organizations before commenting on their operations.

“We have been in the process of trying to analyze these organizations as investments and attempting to measure the return on the investment.

“The goal is to create a management analysis that would evaluate them, define their purpose and measure how much of a return they make,” Goldsmith said.

Standard of accountability

The mayor-elect added, “It is my view these organizations should be held to at least the same standard (of accountability) as city government.” A cadre of Goldsmith volunteers already is looking at the operation of city government, how it can be streamlined and how money could be saved.

Goldsmith said he already has asked the Capital Improvement Board to limit its contract with the convention and visitors association to one year. The board is scheduled to vote Monday on a proposed four-year contract with the convention association that provides \$2.82 million a year.

The mayor-elect said he asked for the one-year contract in case any changes should be made before the budget is passed next year. He said he also hopes to have information on all the organizations to which the city provides money before the budget is passed.

The State Board of Accounts has reviewed the books of the convention association, and report is expected soon.

Among other things, a review of its records shows the association, which receives \$2.8 million in hotel-motel tax revenues, turns around and gives \$150,000 of that amount to the sports corporation and \$103,292 to the Indianapolis Project.

Goldsmith said he has a concern about the flow of money to the organizations.

But Thomas M. Miller, chairman of the boards of the convention association and the Indianapolis Project, sees no problem as long as an accounting is made to the convention association and the Capital Improvement Board, which gives the association the money in the first place.

Miller is chairman of the board and chief executive officer of INB National Bank and chairman of the Corporate Community Council.

'No problem'

He and many other top civic leaders serve on several, or in some cases all, of the boards of the private organizations. But leaders of the organizations say there is nothing nefarious in the multiple memberships.

They also believe tax money is well spent.

Miller said he believes the money "absolutely is well spent. I would like to think if it wasn't, they (the organizations) would be discontinued."

Michael G. Browning, president of Browning Investments, is chairman of the sports corporation board and sits on the executive committees of the convention association, the economic development corporation and the Downtown commission. He also is on the board of the Indianapolis Project.

He also believes tax revenues have been put to good use.

He said the sports corporation and the convention association "have done an outstanding job of enhancing the image of the community. I have no problem with the use of tax money. I wish there could be that kind of return on all tax money.

"From 1976 to 1978, this city was going no place. It was perceived as Indiananoplace. Employers had trouble attracting people because they did not want to live in this community."

The sports corporation was formed to help change the image. "It wasn't just sports for sports' sake. It was (formed) to make people feel positive about the quality of life here."

He said the same is true of the other organizations.

"Now we have a different problem. Companies move their employees here, and they (the employees) don't want to leave (when the company wants to transfer them). The perception of the city has changed."

Too few volunteers

Donald W. Tanselle, chairman of the executive committee of Merchants National Corp., is another of the civic leaders who serves on more than one board.

He serves on four of the boards and is chairman of the economic development corporation and the Downtown commission.

Tanselle said his multiple board memberships are not by design.

"It's the nature of business organization in the community. The fact is there are few home-based businesses in our community. In general, most volunteers are the leaders of those organizations that are home-based in that community.

"As a result, there is just a smaller group of those who serve. Efforts are constantly being made to expand (the number of volunteers)."

Ironically, Tanselle's bank recently was bought out by National Citicorp of Cleveland.

Browning also sees no design in the makeup of the various boards.

"It [if] there is (a design), then nobody let me in on the grand plan.

"One of the things that is a serious problem is that we have to broaden the volunteer base. You burn guys out and they're not as effective. The community needs to get more people on board," Browning said.

Tanselle said he has been in Indianapolis almost 44 years and has been involved in community organizations for at least 35 years.

Money to other groups

The banking executive also said he had no problem with the convention association's providing the other organizations with money.

"First of all, you have to recognize that the ICVA has the resources through the hotel-restaurant tax.

"Then look at the relationship between the sports corporation and the Indianapolis Project. They certainly strengthen and support the mission of the ICVA.

"The project keeps our name out front, and the sports corporation brings and promotes sporting events.

"I suppose they both could be a part of the ICVA. But since their missions are so specific . . . I think some degree of independence is necessary, particularly in the case of the Indianapolis Project, whose efforts have been very helpful in the mission of the IEDC (development corporation)."

The fact that the convention association gives some of its money to related organizations does not bother Browning, either.

Merger not wanted

And Browning says he does not believe that putting all the organizations under one umbrella group would help.

"Centralization would be counterproductive. Our focus (sports corporation) is to bring events here and to make sure they are successful. I know what it takes just to do our piece of the thing. I don't think it would help to be part of a centralized organization.

"It's the same story for the ICVA and the Commission for Downtown," Browning said.

He said each has a special role, and it "is all a part of the strategy to enhance the quality of life."

Tanselle also says he would not favor a merger of the organizations.

"That's an age-old argument. There isn't any question there would be some administrative savings with such a consolidation. But the organizations are so heavily dependent on volunteers, you would lose some of the enthusiasm of the volunteers. They would get lost in the bigger pot," Tanselle said.

Miller thinks "it is better to have smaller units. It's easier to keep track if different people are on different organizations."

Goldsmith also said centralization may not be the way to go.

"I think simplicity in funding is important," but he said he would not want to do anything "that does reduce the number of people participating."

Indianapolis' top civic leaders and the organizations they serve

These 22 executives serve on many of the same boards. The organizations represented here, though private in nature, promote the city and attract businesses and special events.

Movers and shakers	ICVA*	IEDC*	IPI*	ISC*	CFD*	Other
Gerald L. Bepko Chancellor of IUPUI	Board member	Board member	Board member	Executive committee		
Thomas W. Binford Chairman of board of Binford Associates, management consulting firm	Executive committee	Board member	Vice Chairman			
Phillip C. Borst City-County Council member	Board member	Board member	Board member	Executive committee	Board member	
Michael G. Browning President of Browning Investments	Executive committee	Executive committee	Board member	Chairman of board	Executive committee	
David E. Carley President of Demars Haka Development Corp.			Board member		Board member	
James E. Dora Chairman of General Hotels Corp.	Executive committee		Board member		Board member	President of CIB*
David R. Frick Managing Partner of Baker and Daniels	Board member	Board member	Board member	Board member		Treasurer of CIB*
Terry Hardy Certified Public Accountant with Ernst & Young		Treasurer	Assistant Treasurer			
Mike Higbee** Director of Indianapolis Metropolitan Development Department		Board member			Board member	
William H. Hudnut** Mayor	Ex officio board mem.	Ex officio board mem.	Ex officio board mem.			
William K. McGowan Jr.	President & CEO		President & CEO	Vice President	Board member	
Thomas M. Miller Chairman of the board and CEO of INB National Bank	Chairman of the board	Executive committee	Chairman of the board			Chairman of CCC*
James T. Morris Chairman and CEO of IWC Resources Inc.	Executive committee		Board member	Executive committee		
John A. Myrland President of Indianapolis Chamber of Commerce	Executive committee	Board member	Board member			
Frank O'Bannon Lieutenant Governor	Ex officio member	Ex officio member	Ex officio member			
Robert H. Reynolds Partner of Barnes and Thornburg	Executive committee	Executive committee	Executive committee			
Gene Sease Chairman of board of Sease, Gerig & Wilcox	Executive committee		Executive committee		Executive committee	
Jerry D. Semler President of American United Life Insurance Co.	Executive committee			Board member	Executive committee	
Jack R. Shaw Managing partner of Ernst & Young		Board member	Treasurer, executive committee		Treasurer	
Donald W. Tanselle Chairman of executive committee of Merchants National Corp.	Board member	Chairman of board	Board member		Chairman of board	
Marjorie Tarplee Executive Director of Central Newspapers Foundation	Executive committee				Executive committee	
Rev. Charles Williams President of Indiana Black Expo	Board member		Board member	Vice President		

Acronyms represent the following organizations: Indianapolis Convention & Visitors Association, Indianapolis Economic Development Corp., Indianapolis Projects Incorporated, Indiana Sports Corp., Commission for Downtown, Capital Improvement Board, Corporate Community Council.
**Leaves office Jan. 1

Source: Above organizations.

Flow of funds for city organizations

These local organizations are for the advancement and enhancement of Indianapolis as a city. More than half of their total budgets come from tax dollars.

Recipients:

ICVA

Indianapolis Convention & Visitors Assoc.
88 board members (19 are officers or on executive committee)
Total budget: \$3,822,375

IEDC

Indianapolis Economic Development Corp.
28 board members (15 are officers or on the executive committee)
Total budget: \$738,597

IPI

Indianapolis Projects Incorporated
24 board members (9 are officers or on executive committee)
Total budget: \$657,642

ISC

Indiana Sports Corp.
37 board members (13 are on executive committee; 37 vice presidents)
Total budget: \$866,508

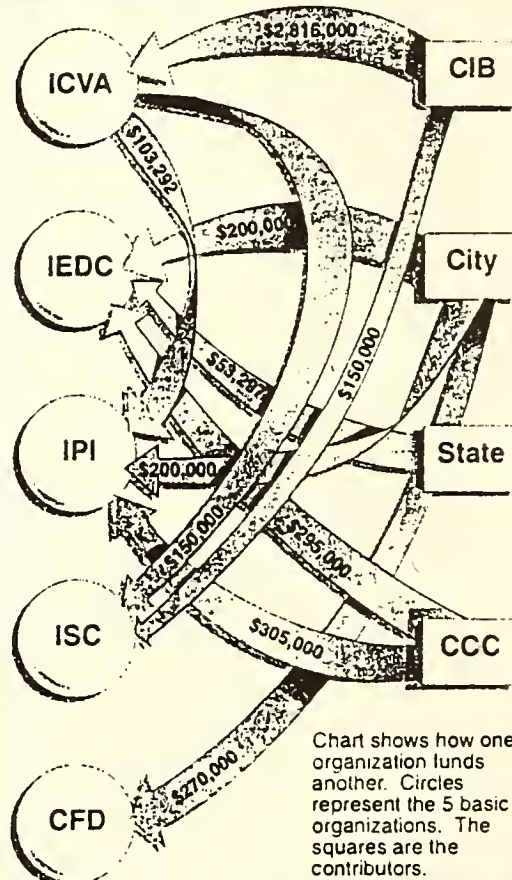
CFD

Commission for Downtown (CFD)
55 board members (24 are officers or on the executive committee)
Total budget: \$810,000

Contributors:

- ☐ Capital Improvement Board (CIB)
- ☐ City of Indianapolis, Department of Metropolitan Development
- ☐ State of Indiana, Department of Commerce
- ☐ Corporate Community Council (CCC)

Source: Above organizations



STAR STAFF GRAPHIC

APPENDIX 2.

Downtown Development: Keeping the Momentum, CEO Roundtable, 4 INDIANAPOLIS C.E.O. 6, 18-67 (Nov. 1991).*

N. Cotterill: If we could, I'd just like to start out with Harold and Bill's concepts of how important the Circle Centre mall is to other downtown development projects.

Garrison: Well, my view of that may come from a little different angle due to my architectural background. I look at cities as a whole. And sometimes when we talk about development we tend to isolate buildings as if there is no relationship to one another. So, in reference to the mall as part of the city, rather than as a building, I think it's important to the other projects because we don't have a fabric without it — the fabric of retail, office and housing, etc., to create what a city really is. And we have plenty of history to tell us that without the right fabric, a city will deteriorate, and it also creates an economic catastrophe. You can point to cities around the world that have the right fabric and they have succeeded over centuries. So, when I think about the mall, to me it's a missing link. How it relates to an individual office building is intangible — because it isn't that a person is going to sign a lease in one of our buildings or anyone's buildings because the mall is across the street. But the relationship is in the psyche of saying, "Do I want to be downtown and be part of an environment?" Without it, I think you are constantly faced with the black image of a Detroit and some of these other cities that constantly just deteriorate over time.

N. Cotterill: Speaking as primarily a downtown developer, has the potential of the mall already had an effect?

Garrison: I think tremendously. I believe that most of the lenders around the country have always viewed it as very positive, because I think they have seen that when you have a *total* community, everything succeeds. I know its viewed positively with people coming into town looking to locate here — I know when we've talked to them — it's right up at the top of the questions that are first asked.

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Moore: I think Harold is talking about creating something of a lifestyle downtown, certainly a retail element downtown is a vital piece of the pie . . . not only for local residents but for visitors as well. I was talking to the manager in St. Louis' downtown mall and he said that they are doing approximately a third of their volume from their convention visitors.

N. Cotterill: But, are they doing enough *total* volume?

Moore: I think they would like to do more, but I think it's a successful mall. St. Louis has seen its downtown literally move out over the last 20 years. Its population, I believe, is down to almost half of what it was. Today, that mall provides an amenity that attracts people that want to work downtown and visit downtown St. Louis.

In our case, it's hard — it's the chicken and the egg question: What comes first? We have heard talk that the mall needs a 24-hour population nearby. But the mall in itself will make it much more desirable for people to seek housing in the central business area. You do need a good hotel base, a good convention base which obviously creates good opportunities for fine restaurants. These are all necessary amenities that, I think, are definitely taken into consideration by people choosing office space locations.

N. Cotterill: From what everyone is saying here, the mall is integral to other downtown projects, and yet there have been persistent concerns about whether the mall would be built and whether financing was falling through. As you know, Mike Highee had planned to be with us today and sent John Labaj in his place because he was at one of the "emergency" meetings. John, can you shed any light on what's happening at all?

Labaj: I would say that you have to realize that there are a number of different levels of negotiations that are being negotiated right now which is very complex. We have a level of negotiation that is between the city and Melvin Simon & Associates on the project that is very important, which is at the top on our list. And the second most important one is Melvin Simon & Associates' negotiations with the limited partnership on the partnership agreement — another very important negotiation. The third level of negotiations is between Melvin Simon & Associates and the major anchor

department stores. Without the major anchor department stores, this project is not going to happen. And fourth, there is also a negotiation for the actual construction financing. All of those negotiations are happening at the same time and all have to be somewhat at the same spot in order for one of them to work. All of those have to happen at the same time, and that is what is causing the delays right now. It's the complexity of it and making sure all of those elements are roughly in the same spot so that each portion or level feels comfortable enough to keep on going on.

N. Cotterill: Are you comfortable with the idea that it is not going to hit another major snag at this point?

Labaj: I don't believe it's going to hit a major snag. We have so many attorneys involved you never know. But, no, I think we are really past the point that a major snag can happen, as far as the actual major overall structure of the business transaction.

N. Cotterill: Maybe you can shed some light on where exactly the mall stands.

Murphy: I was at that meeting. I just came directly from that meeting earlier this morning. There was basically a presentation to the corporate partners on where the mall stands and what needs to be done to finish the project.

N. Cotterill: Who are the corporate sponsors?

Murphy: Well, there are 13 right now which represent the major corporate and economic structure of the city including Eli Lilly (and Co.'s Retirement Plan), Indiana Bell, American States Insurance, and others.* We could have probably signed an agreement with the city at the end of June, early July. But, the credibility and the weight that agreement would have carried is increased greatly by continuing negotiations with the corporate partnership. (*Included in the list of corporate sponsors are: American United Life; Associated Insurance Cos. Inc.; Banc One Indiana Corp.; Conseco Inc.; DeMars Corp.; Haka Inc.; INB Financial Corp.; Marsh Supermarkets Inc.'s Retirement Plan; and Merchants National Corp.)

N. Cotterill: They are financially tied in at this time?

Murphy: Absolutely. When they sign this agreement, they will be. The department store relationships are sold. Herb was out at Nordstrom last week, and he talked to The Limited

this morning, they are dealing day in and day out with Lazarus and all three of those leases are out for signature. And all of them are very happy with the progress we are making, not only on the agreements but on the designs and everything else.

N. Cotterill: Is Lazarus a done deal?

Murphy: The lease is out for signature. It's not a done deal until it is signed. We are absolutely confident that it will be a done deal very soon. Probably the most exciting development since early spring and since the formation of the partnership is the evolution of the design, and probably 50 percent of the meeting today at Lilly was to present — for the first time even to some of our corporate partners — some new ideas and some new evolutions in the design of the project.

As you know, we have gone through many designs to the point where we quit producing renderings after a while because it was very expensive. There will be, by the time this is published, hopefully, some announcements in relation to the design of the project which I think will provide a very, very dramatic — we have been using the term “signature piece” to the mall that the city will be very proud of and very excited about.

N. Cotterill: Architecturally?

Murphy: Architecturally, functionally. Then, again, I'm not at a point right now where I can talk about it in detail, but I think Harold will be very excited about what this means for the city, and I think all of us will be. On a more practical level, the design has been improved, as well as from a business standpoint and from a retail standpoint so that we have more leasable area. We have done things like we have moved Nordstrom all the way south of Georgia Street now along Meridian. The area footprint on the mall has increased on the first floor. The hotel has been moved from Georgia Street up to Illinois Street so its actually opposite Merchants Plaza now. We are going to move the movie theaters, we think, to the south side of Maryland Street, if I'm correct.

Labaj: Yes.

Murphy: What we are doing is changing Illinois Street into what our architects call a 24-hour street. It is a bridge between the office environment from the Circle and up to Ohio Street and the environment along Georgia Street.

N. Cotterill: I think the person passing through our downtown area right now, though, is wondering when they are going to see something other than shovels at work. When are they going to see something coming out of the holes?

Murphy: I think John can speak to that.

Labaj: We have a lot of parking garages to construct down there in the holes for awhile, because we know that this mall has to have quick and easy parking access, probably quicker and easier than you actually have in a suburban location. And what you see happening now are the concrete, shoring and hopefully finishing up construction on those parking garages in 1992.

J. Cotterill: Is it too early to say when you think there will be some kind of opening for the mall?

Murphy: We are looking now at April to August, which I know is a large window, but April or August of '94. A lot of it depends on things going right from here on out.

N. Cotterill: If you had to put your own money on that, would you say that date is going to be moved again?

Murphy: I would think not. I think most of the major hurdles are behind us. We still have to finance the project. We have hired Goldman Sachs to market the deal nationwide and internationally. There have only been a couple of malls financed in the entire United States this year. One was in Nebraska and another one was in Montgomery, Maryland, and that required a consortium of three European banks. And it was a smaller deal than this. So the financing is not to be trivialized at all.

J. Cotterill: Let's pursue that issue. In as simple terms as possible, how many dollars does it take? Where does it come from? What is the city's commitment?

Labaj: The city's commitment was \$150 million and that was basically raised through taxes and financing mechanisms and also from a loan to the city from the state's Rainy Day Fund. That commitment was on the table in the beginning, and that is it. Before that, we handled the property acquisition to put together three-and-a-half blocks of downtown real estate. We felt that that was appropriate re-development activity for the city to try to make these types of developments happen. They are quite different than one or two owners in a corn field.

In constructing an urban mall, we have multiple owners and tenants who have essentially the city's commitment of \$50 million to assemble the land. That was really the trigger. And the rest of those funds are for such as parking - to construct the parking underground as we need to in the mall as something that would not happen within a suburban location.

N. Cotterill: This is Mayor Hudnut's "leveling the playing field . . ."

Labaj: Right. The exact concept. That and the connectors between the three-and-a-half blocks for the preservation and architectural elements in detail are also in that "150 million." I think we can turn it over to Mike for —

Murphy: Well, the private sector financing has changed so much over the past few years. It used to be that we could start a mall without any financing because we knew that we would get it before the mall would open. Obviously, that is not the case anymore. If you can get financing, they require a heavy infusion of equity, anywhere from 30 percent to 50 percent. In this case, we are looking at between \$120 million and \$150 million for the private sector part of the mall. As part of that, we are looking for \$50 million to \$70 million from our corporate partners which then leaves you with maybe another \$70 million to \$80 million to finance other ways. That is what we'll be marketing through Goldman Sachs after the agreements are signed later this month.

Weedman: You know there is something else. You talked about the St. Louis mall. Wasn't that about a 24-year project before it finally got built?

Murphy: I'm glad you brought up the St. Louis project, because people ask us about that. It's one of our first downtown projects. But, it's really a bit unfair to compare our project here in Indianapolis. In some ways we would compare much more favorably.

Weedman: And this particular project has run into the whole debacle of retail bankruptcy, the recession, everything in the world that could really — I suppose most of us would have said, "I give up," a long time ago.

Murphy: You are right.

Weedman: I think it's a major credit for the Simon's and the city that they kept at it. About everything that could have happened, has happened, and it's still going.

Murphy: Even though historically we date Circle Centre back to the late 70's. The true nuts and bolts planning began in about '82 or '83, so it is really only an eight-year project to this point. I want to get back to St. Louis Center for a minute, because not only is it twice the size of — the retail portion — of what we will have here in Indianapolis, but it is anchored by two very — I shouldn't say average, but very —

Labaj: Mid-level.

Murphy: . . . Mid-level department stores in Famous Bar and Dillards department stores that are available in every single suburban mall in the St. Louis area. There is nothing in that project to distinguish itself from the suburban market. In essence, there is less to draw the shopper out of the suburbs to that project. Here with Nordstrom with theater complexes, with the type of things we are planning on. There will be much more — the potential is much greater for success here. And St. Louis is rather a successful town.

N. Cotterill: I would like to bring up one of the reasons that Sid is here, although, he is now a banker —

Weedman: I'm just an observer.

Labaj: Most bankers are.

N. Cotterill: Sid is now an observer. But as we all know, before he was an "observer" he was the Executive Director of the Commission for Downtown, and the Executive Director of the White River Park Commission, and as I heard Harold talk about the fabric of the community and of the downtown area, particularly, White River Park jumps to mind as an important entity. Can you give us your perspective of where that is? What would you like to see happen there?

Weedman: I think it's in its dormant stage and will be for a while for several reasons: Money being the primary reason. The park was part of this whole synergy that was going to take place. Harold cannot isolate any one of these projects on its own. If you remember, the Union Station project was just dead in the water for probably 20 years. Right, John?

Labaj: Right.

Weedman: Everybody tried, but nobody could get anything done until almost the day they started excavating for the

Hoosier Dome. And all of a sudden, Bob Borns started moving Union Station ahead to become a reality. And then 60 restaurants opened up in the next two-and-a-half years within the dead area south of Washington Street. So all this symbiotic — one project makes another project work which makes a whole lot of other things happen. The White River Park was part of that synergy. There's been 65, 75, 120 acres of land — set for redevelopment. There is about 40 of it that hasn't been done yet. And it's 40 prime acres. I think as the economy changes, things get better, and the mall progresses, somebody is going to take a look at that and say, "We can't let this continue to lie dormant." And it will happen.

N. Cotterill: Do you think that the state is going to revive its interest in it? I mean, it is an unpopular subject right now in the legislature.

Weedman: I think if you had a terrific project and major investors walk in and say, "OK, state of Indiana, this is what we are going to do and this is the pro forma and this is the money, this is the equity, this is the financing and you are to do your share," which is whatever it is. I don't think any rational legislature or administrator could walk away from that.

N. Cotterill: You don't see the legislature as an obstacle?

Weedman: Not as long as there is a deal.

N. Cotterill: Let's talk about the deal. We thought for a while that Knott'sberry Farm was going to be the group to come in and put in place the park that we envisioned. Do you have any special perspective on that? Can you enlighten us as to what you think went wrong?

Weedman: The original idea way back in '78 or '79, was: Let's get Disney to do this park. If you had Disney in here, everybody would be running in and throwing money at it. They would want a piece of it. But even with the name value of Disney, that didn't happen.

N. Cotterill: Disney didn't think we had enough acreage for them. Right?

Weedman: Right. And they wouldn't have put up big money anyway. Not when France is giving them \$2 billion to build a park. They're not going to put any money into White River Park. So we went through a period where there were not

what you call very credible people coming up with plans. In my opinion, the No. 2 firm in the United States would be Knotttsberry. They were not going to put up any money. It was the credibility of them as an operator, them as an park designer, as an entertainment leisure-time business that would attract other types of money to come in. So they didn't put any money on the table, other than maybe a \$150,000 in design fees. So they were not a deal as such. They were the catalyst for the deal. And the state — I think even if you had someone with the money, the state would have had to postpone getting involved because of the recession, because they have so many other pressures.

N. Cotterill: Do you see that reviving soon? Do you think that the mood and the economy is going to turn quickly enough to hang onto what we have already accomplished?

Weedman: My hope is that, in the best of all worlds, nobody gets panicky and does anything with the 40-some acres on this side of the river, like somebody comes in and says, "I want to build a warehouse." And some member in charge says, "Fine. That's money. Let's take this." That would be a disaster.

N. Cotterill: That land is now owned by whom?

Weedman: State of Indiana. If they would just land bank it and be cool about it, I think sometime in the next five to seven years, we are going to see something happen.

N. Cotterill: Correct me if I'm wrong, gentlemen — but I don't believe downtown developers and others would be anywhere near as upset if the White River Park project didn't happen as they would be if the mall didn't happen. Would you agree with that? I mean retail is something we have — or had — downtown. A park of that nature is not.

Weedman: I think that the difference — I think you may be right. But the primary difference is that where the mall is concerned there are an awful lot of open spaces right in the heart of downtown where everybody expects there to be buildings, regardless of whether there is building. The park sits over there, and it was already a lot of open space. So I think it's: "Well, we have torn down all of those buildings to build a mall and we have all of these construction fences where I want to walk to get to my lunch." That creates a more immediate need to get this mall built and things cleaned up.

Garrison: I don't think the park development is over. You know, this is going to go on for generations to come. I was telling John that I haven't been to a dinner party in a year where the question doesn't come up, "Harold, when is the mall going to get built?" Well, I'm not doing anything with it, but it has to be built. That has been my answer. People think, "Well that is not a very businesslike — I mean, why should the city spend money, etc.?" But, they don't understand. If we don't do it, what are we left with? How are we ever going to be a city? You have to replace vacant dormant buildings with something. No action is not an answer.

Garrison: One of the best things to look back on, Bill, is when we first started downtown in 1980, we were told never to go south of Washington Street. You were a fool to buy a building in that area. We were looking at the Century Building, because no one would go south of Washington Street. I mean, if you were to take a photograph of the skyline just exactly a decade ago and you think, "Well, what drove it to this point?" And I am personally proud of what we have. You know, traveling around the country and even around the world, Indianapolis is now recognized. People were embarrassed to say they were from Indianapolis at one time. So I think sometimes you just need to look back and see what we have accomplished. I think as we look forward, really, the agenda is dictating the completion of the mall. But, I still have another agenda and it's housing. I keep trying to remind the city of it. I know it's a need that is there. And then you think of White River Park and other downtown projects, housing included . . . I don't think we should think of those as the end. There is still more of the same to come. We are just preparing for the next phase.

N. Cotterill: I think there is a little "If you build it, they will come" mindset kind of left over from building the Dome, I also think that we are a city that got used to instant gratification. We'd announce a project and it happened. It was the right time for those kinds of things to happen instantly. Then we ran into roadblocks with the park and the mall. It is hard to re-educate the public and there's no getting around the fact that the problems came as a shock to them.

Garrison: That is perception, though. People believe that is happened quickly. A lot of these things that you point to, really took a lot of years to put together, but, you know,

the general public and everyone forgets. Truth is the Dome didn't happen overnight. Union Station didn't happen overnight. Nothing has happened that quickly. It's just that people forget.

Weedman: How many people remember that your 10 West Market, that gorgeous 25-story building . . . that it wasn't very many years ago — five years ago, that there was a kind of cut-rate drug store and a shoe store in there?

Murphy: That's right.

Weedman: And everybody walks by there today and they just take that for granted. Time compression and perception is a huge part of all of this.

N. Cotterill: In the life of a city, it's not really not very long at all.

Labaj: That is one of the things about being a city official here. It's about making no small plans. I mean, my predecessors took a really big risk back in the '60s and '70s, and said, "We have a problem here. We can just ignore it or we can, you know, make the grand plans. Make no small plans; and let's, as a city, try to solve these problems and do something about them." You know the other side of this is the abyss. And the abyss is Detroit, New York, Gary. We all know what the abyss is. We can just kind of ignore that and just hope that the abyss doesn't happen, or we can make the big plans. We can dream and dreams. And, as long as those dreams and plans are in place, you are always going to have market downturns and upturns, but you have to ride through them. Because you have to have the plans and the vision there. If you don't have that vision for your community, I don't think your governing correctly.

N. Cotterill: Governing is the issue. That is what happened to those cities. They had no leadership, which leads me to a question that I have to ask: Is the continuum there? We are going to have a new mayor very soon. How much of this depends on the support of our new mayor?

Murphy: I can say that a tremendous amount has depended on Mayor Hudnut because of his vision and his leadership, and quite frankly, the courage he has displayed over the past several years. But we have been assured by both Mr. Mahern and Mr. Goldsmith that their commitment to the mall is

resolute and that the responsible action for the next mayor to take is to follow in Hudnut's steps and make sure this mall is completed. The one point that people I think need to understand is that we didn't have a stagnant situation downtown. We had a deteriorating situation and it continues to deteriorate. One time we had 85 percent of our retail dollars spent downtown, and now it's 2, 2 1/2 percent. It's getting worse. Stores are closing up all the time and trying every effort to survive.

You mentioned the idea left over from the Hoosier dome, just build it and they will come. I don't think we have to think that way in this case, because we have a fairly new existing downtown mall at Columbus, Ohio, that is proof that it will work. That mall is bringing 40,000 people a day into downtown that don't normally come to downtown Columbus. And during the month of December last year it averaged 80,000 a day.

N. Cotterill: What kind of numbers would we like to see for the Circle Centre mall?

Murphy: I think we can do better than Columbus. I hope John agrees. I think the draw of Nordstrom will be higher than the draw that they have over there, and even though we are very similar demographically to Columbus, there are several factors in our favor. Our cost of living is lower, our average income per household is higher, which in our minds translates a more discretionary income. We are growing faster — neither city is growing quickly, but we are growing at a faster rate than Columbus is. There are several demographic and market factors that point to us having better chances for success than Columbus.

N. Cotterill: Have retail sales had an upturn of any note? I mean, are you heartened by any of that?

Murphy: We are heartened by the emerging stability of the department store chains. We think that several of them will emerge from bankruptcy yet this year or early next year. We think that the small shop situation in the Midwest is pretty stable. But retail sales as you may have seen just this past week, Sears and Wards and some of the other companies are saying that the back-to-school sales, which are a barometer of Christmas attitudes so to speak, have been disappointing.

* * *

The Meaning of the City: Urban Redevelopment and the Loss of Community

DENIS J. BRION*

INTRODUCTION

In *Planning for Serfdom*,¹ Robin Paul Malloy vigorously argues that the widespread redevelopment of the deteriorated centers of United States cities has destroyed fundamental political values. More specifically, Malloy argues that public-private partnerships,² which have been the vehicle for these large-scale redevelopment projects, function in a manner that radically departs from classic liberal values.³ Classic liberalism, under Malloy's definition, seeks to maximize freedom, individual liberty, and human dignity through capitalism and the free market as counterbalanced by a limited state.⁴ These redevelopment partnerships, by contrast, amount to exercises in "state capitalism" and "urban socialism"⁵ and are part of "ever increasing trends toward central planning, communitarianism, and statism."⁶

Implicit in Malloy's argument is the assumption that classic liberal values carry a political validity that is absent from the values present in these ubiquitous public-private partnerships. Surely this implication is correct. The tenets of classic liberalism reflect the Enlightenment values that formed the basis of late nineteenth century American Revolutionary rhetoric⁷ and continue as a major theme in current political rhetoric. The principles underlying redevelopment partnerships, by contrast, are hierarchical in nature, replacing broadly participatory public decision-making with a decisionmaking coalition limited in practice to the eco-

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1. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

2. For a description of how these partnerships contributed to large scale redevelopment projects in five United States cities, see *id.* at 10-15.

3. *Id.* at 14.

4. Malloy describes his concept of classic liberalism broadly. See *id.* at 16-29, 49-52, 79-83. The definition in the text is taken from his more succinct treatment in ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 93-98 (1990) [hereinafter MALLOY, LAW & ECONOMICS].

5. MALLOY, SERFDOM, *supra* note 1, at 12.

6. *Id.* at 9.

7. *E.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

nomic and political elite of the local community.⁸ These hierarchical principles are more consonant with those of the autocratic order against which eighteenth century American revolutionaries directed their rhetoric.⁹

In the Prologue of *Planning for Serfdom*, Malloy sets out nine "ideological norms and values" of market theory that define the boundaries of his book's "legal economic" discourse.¹⁰ The market-based economic process functions to achieve the end values of classic liberalism. The second of these norms and values, "the rationality and appropriateness of individual empowerment and decision making,"¹¹ is particularly relevant to the role that demand plays in the interactions of the economic market. This Article argues, however, that Malloy's critique falls short of telling the whole story. Using Malloy's second demand-related ideological norm as a point of departure, this analysis inquires more deeply into its practical implications in order to bring into focus communalism,¹² an alternative world view that also has strong roots in American culture.

Malloy uses urban redevelopment as an exemplar of a wider process of erosion of classic liberal values. The analysis in this Article has two purposes. The first purpose has a broader focus. It seeks to place classic liberal values in a wider critical context by offering a critique of urban redevelopment practice from an alternative set of values. This analysis demonstrates that these alternative values must be incorporated into the political process in order to end the broad erosion of classic liberal values. The second purpose is more narrowly focused. It seeks to demonstrate that these values must be incorporated if the city is to fulfill its potential, both as a desirable physical habitat and as a milieu that catalyzes creative energies throughout the widest spectrum of society.

Central to this analysis are the issues of meaning and power. How do urban buildings and urban spaces come to have meaning? What is the substantive nature of the meanings that arise? Why is it important that the urban fabric have meaning? And, most crucially, if indeed this matrix of meaning is important, who shall have power over the processes by which this meaning arises and over the elements of the urban fabric that are integral to these processes?

8. A member of the Indianapolis economic elite of the private Columbia Club stated, "Anything of importance in this town starts right here It's almost a law." Louise E. Levathes, *Indianapolis: City on the Rebound*, 172 NAT'L GEOGRAPHIC 230, 248 (1987).

9. *E.g.*, *id.*, *passim*.

10. MALLOY, *SERFDOM*, *supra* note 1, at 3.

11. *Id.*

12. The "communalism" that will play an essential role in the argument of this essay differs from Malloy's "communitarianism," which he defines in terms of a "strongly statist ideology." *Id.* at 74. See also MALLOY, *LAW & ECONOMICS*, *supra* note 4, at 76-82.

The analysis begins with an illustrative examination of urban redevelopment practice and the ratification of such practices by the judicial system in order more fully to expose the losses that this practice produces. Next, the Article delves into the ubiquitous phenomenon of human beings investing the urban fabric with meaning, thereby creating a conceptual structure that is central to human self-definition. The analysis concludes by arguing that the values of the communal world view must underlie this meaning-creating process if it is to work well.

I. THE PROBLEM

Two urban redevelopment cases — the 1954 decision of the United States Supreme Court in *Berman v. Parker*¹³ and the 1981 decision of the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*¹⁴ — amply illustrate the workings of hierarchical public-private development partnerships, the physical and psychological consequences of the massive projects that these partnerships typically carry out, and the ratification that the courts have given to the purposes of these projects and the means by which these partnerships carry them out. *Berman v. Parker* involved the redevelopment of a substantial portion of the southwest quadrant of Washington, D.C., an area that, as the opinion abundantly demonstrates with facts and figures, exhibited all of the statistical indicia of a harrowing, neo-Dickensian slum.¹⁵ The vehicle for carrying out the redevelopment project was a prototype of Malloy's public-private partnership. A specially created public entity, the Redevelopment Land Agency,¹⁶ held the power to take title to the project area by eminent domain,¹⁷ raze the entire area,¹⁸ install the service and utility infrastructure required to support the new pattern of uses¹⁹ set out in a redevelopment plan formulated by a separate planning agency,²⁰ transfer these infrastructure facilities and sites for such public uses as schools and fire stations to the appropriate government entities,²¹ and

13. 348 U.S. 26 (1954).

14. 304 N.W.2d 455 (Mich. 1981).

15. *Berman*, 348 U.S. at 30.

16. Congress authorized the redevelopment scheme and established the structure for carrying it out in the District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790 (1946) [hereinafter Redevelopment Act]. Section 4 of the Act created the Redevelopment Land Agency.

17. *Id.* § 5.

18. *Id.* § 7(h).

19. *Id.* § 7(i).

20. The National Park and Planning Commission formulates the redevelopment plan, subject to the approval of the public governing body of the District of Columbia, the Board of Commissioners. *Id.* at § 6.

21. *Id.* § 7(a).

sell the rest of the area parcel by parcel to private developers who would establish uses consistent with the plan.²²

Morris, the owner of a presumably modest, but economically viable, department store in the renewal area, challenged the constitutionality of the proposed taking of his property for incorporation into the project.²³ Morris argued that this taking would violate the implicit meaning of the Fifth Amendment to the United States Constitution by taking nonblighted²⁴ property for the purpose of destroying its current use and transferring the land to another private owner for a private use.²⁵ The Court rejected this argument. Adopting an expansive view of the public power of eminent domain, the Court held that a private use which serves the public benefit satisfies the "public use" requirements of the taking clause.²⁶

The Court was similarly expansive in addressing Morris's second argument. Because his store was not in a dilapidated or unsanitary condition, Morris argued that it was not contributing to the problem and taking and destroying it would therefore not serve the public interest. This point posed considerable difficulties for the district court below.²⁷ The district court resolved these difficulties by holding that the government had the authority to take and eliminate slum *structures* by eminent domain,²⁸ and it had the authority to take the *land* underlying these slum structures and transfer it to others for private uses. The district court limited seizure of the land to situations in which "the seizure of the title is necessary to the elimination of the slum"²⁹ or "the proposed disposition of the title may reasonably be expected to prevent the other-

22. *Id.* § 7(b)-(g).

23. The case below, *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953), consolidated two challenges, one brought by Morris, the owner of a department store, and the other brought by Schneider, the owner of a hardware store. Apparently, only Morris brought an appeal to the Supreme Court. See *Berman v. Parker*, 348 U.S. 26, 31 (1954). The caption to the Supreme Court's opinion styles appellant as "*Berman, et al., Executors.*" *Id.* at 26.

24. *Id.* at 34.

25. See *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937).

26. *Berman*, 348 U.S. at 33-34. *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896), enunciated the traditional view. The Nebraska Board of Transportation, having determined that there was insufficient price competition between two grain elevators at a particular station on the railroad, ordered the railroad to provide a site to allow for construction of a third elevator. Though the public benefit of price competition was undisputed, the Supreme Court held that this was an impermissible "taking of private property of the railroad corporation, for the private use of the petitioners." *Id.* at 417.

27. *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953).

28. *Id.* at 715.

29. *Id.* at 716.

wise probable development of a slum.”³⁰ The district court held, however, that the government did not have the authority to take *non-slum* property and transfer it for preferred private uses. It held that “Congress, in legislating for the District of Columbia, has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agents’, judgment of what a well-developed, well-balanced neighborhood would be.”³¹

The Supreme Court agreed with the district court that government has the authority to take and transfer land for private use in order to prevent the recurrence of a slum.

The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, and the presence of outmoded street patterns.³²

The *Berman* Court, however, disagreed with the district court on the question of whether government has the authority to take non-slum property and transfer it for preferred private uses.

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.³³

In attempting to understand *Berman*, one must first consider its implications and consequences in terms of the values of classic liber-

30. *Id.*

31. *Id.* at 720.

32. *Berman v. Parker*, 348 U.S. 26, 34 (1954).

33. *Id.* at 33.

alism.³⁴ According to these values a presumption exists that the dominant mechanism for allocating resources to productive use is the free market for goods and services. Governmental intervention in the functioning of this market is viewed as improper unless it is necessary to correct a breakdown in the operation of the market that deserves the values of freedom, individual liberty, and human dignity.

In the mid-1940s, the general physical conditions in substantial portions of Southwest Washington were degraded. Was there, however, a need for governmental intervention in order to improve these conditions? Or, to turn the question around, why was there no private action to put the land to a more valuable use?

The *Berman* opinion does not probe this question. Instead, it simply describes the degraded conditions and concludes that the legislature should determine the proper ends for the exercise of the police power.³⁵ "When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,"³⁶ and "once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine."³⁷

This short and conclusory chain of reasoning from problem to solution is far too facile. Rather, the failure of a spontaneous correction of the slum conditions might have arisen from any of a number of factors, each requiring a different type of governmental intervention to correct the problem. Only one of these factors, however, requires a *Berman*-style public-private partnership to achieve an efficacious solution.

At the most fundamental level, the absence of private action might simply have been the result of a properly working free market. Residents of the slum area may only have had the economic means to demand the level of quality that actually prevailed, and no other demand may have existed for land use in the metropolitan land market at a higher

34. Perhaps an ultimately unfruitful way to criticize *Berman v. Parker* would be to focus on its most obviously vulnerable point — the seeming paradox of how an admittedly private use can amount to a public use. It is not readily apparent how it can be a public use to replace Morris's Department Store with an upscale boutique or a tourist trap pseudo-seafood restaurant. Then again, it is not readily apparent how Ollie's Barbecue in Birmingham could have been an instrumentality of interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The Fifth Amendment, by its unavoidable syntax, requires judicial line drawing, and judicial line drawing cannot be an exercise which can be subordinated to objectively rational criteria within the terms of the polar opposites that the syntax establishes. Thus, criticism of *Berman* must proceed on criteria extrinsic to the values that underlie the polar, and non-lexically ordered, opposites that the formal syntax establishes. These criteria, however, are abundantly available.

35. *Berman*, 348 U.S. at 30.

36. *Id.* at 32.

37. *Id.* at 33.

level of economic intensity. If this was the case, there was no market failure.

To the extent that broader public opinion "demands" the elimination of the blight, the rational response by government is not to enter into the large-scale enterprise of a redevelopment partnership with private entrepreneurs. Rather, government and the citizens who are demanding government action face a welfare problem. The proper solution to such a problem is the redistributive transfer of sufficient wealth from the general population to the slum residents, thereby enabling them to demand a level of quality land use acceptable to the citizens who demand action to "clean up the slums." Indeed, not engaging in such a welfare transfer would seem to violate the human dignity value of classic liberalism.

Alternatively, the absence of private action might simply have been the result of "redlining," which is the refusal of mainstream commercial and residential lenders to extend credit in urban neighborhoods with a particular racial or ethnic composition. This practice was widespread in urban areas in the post-World War II period and is not uncommon today.³⁸ In these circumstances, the property owners might have possessed the economic means to improve the physical conditions if credit on the prevailing market was available. This artificial refusal of the market to supply capital frustrates the satisfaction of this demand. The solution here, as well, does not require the substantial governmental effort of a massive renewal project. Rather, government need only devise and enforce properly focused prohibitions on discriminative lending practices.

In addition, an unmet demand by outsiders may have existed in the general metropolitan area for higher quality residential and commercial uses.³⁹ Spontaneous market action to meet this demand might not have been forthcoming because of the free-rider problem.⁴⁰ This form of market breakdown arises from the phenomenon of "neighborhood effects." If A invests in the upgrading of her property, part of the economic consequence — the increase in the fair market value of property — accrues not to A's property but instead to the property of A's neighbor, B.⁴¹ When neighboring owners have no basis for mutual trust, each will

38. E.g., RICHARD P. FISHMAN, *HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW* 607-19 (1978).

39. Redlining would not necessarily affect the satisfaction of this demand because that practice appears to be as much a discrimination against certain persons as it is against a particular area.

40. The discussion here of the free rider problem and the subsequent discussion of the holdout problem are based on Otto A. Davis & Andrew B. Whinston, *The Economics of Urban Renewal*, 26 *LAW & CONTEMP. PROBS.* 105 (1961).

41. Thus, B's property enjoys a windfall increase in value solely because it is in a better neighborhood, a neighborhood made better by A's investment. *Id.* at 107.

be tempted to eschew investment and attempt to "free ride" on the improvements made by the others, resulting in no improvement.⁴² This problem is not corrected by a massive redevelopment project. Instead, government need only impose and vigorously enforce a building code requiring physical conditions that approximate the level of quality for which there is an economic demand.⁴³ This leaves each landowner no choice but to invest. It requires, however, an investment that redounds to the economic benefit of each landowner.

Finally, assuming that an outside demand existed, the inaction might have been the result of another form of market breakdown, the holdout problem. It may have been that the pattern of land ownership in Southwest Washington was highly fragmented and that the nature of the outside demand required larger parcels of land than those parcels held by any one landowner in the slum area. A developer whose project requires a land parcel that is currently under multiple ownership must assemble the parcel by bidding away each of its pieces from the current owner. Without the public power of eminent domain, a developer who does not, or cannot,⁴⁴ proceed in secret faces the potentially severe consequences of a holdout problem.⁴⁵ Government can effectively respond to this frustration of parcel assemblage by entering into a partnership with developers in order to supply the holdout defeating power of eminent domain.⁴⁶

This canvass of the various circumstances in which urban slum conditions might persist demonstrates that only one of these circumstances requires a public-private redevelopment partnership to achieve an effective solution. The other circumstances require either a narrowly-focused regulatory scheme or a simple redistribution of wealth. Indeed, as discussed below, the public-private redevelopment partnership is not only unnecessary to solve the problem in these other circumstances, but it also fails to solve the problem.

42. *Id.* at 108-10.

43. *Id.* at 114-15.

44. Particularly in urban settings, most developers have an acute sense of the demand for land use. With several developers competing to assemble the same parcel, maintaining secrecy (i.e., preventing the current landowners of the fragmented parcel from gaining an understanding of the development potential of the assembled parcel) becomes difficult to achieve.

45. Davis & Winston, *supra* note 40, at 110-11. If the developer proceeds openly, she will almost inevitably find that, as she acquires individual parts of the parcel, it becomes increasingly difficult to acquire the rest. The owner of a remaining piece will see that he can hold out for a high price; for instance, it would be rational for a developer who has already committed to purchasing all the other pieces to pay up to one dollar less than the discounted present value of the anticipated net return from the project to the owner of the last piece required.

46. *Id.* at 115-16.

The *Berman* opinion implies that the holdout problem was the operative cause of the slum conditions in Southwest Washington: "It was important to redesign the whole area so as to eliminate the conditions that cause slums The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers."⁴⁷ Unfortunately, however, the Court did not substantiate this proposition. Rather, the Court did little more than repeat the assertions made by the Redevelopment Land Agency. The opinion did not indicate that the Court required the Agency to substantiate these assertions.

Determining whether the Court's assertions are correct requires consideration of the nature of the process by which the particular redevelopment plan for Southwest Washington arose. A natural division of talent existed between, on the one hand, the planners and administrators in the Redevelopment Land Agency and the Planning Commission, and on the other hand, the area's principal land developers, who would ultimately form the pool of potential purchasers of the cleared and prepared lots in the former slum. Government personnel possessed expertise in formulating physical plans that applied normative principles of function, quality, and aesthetic design. The developers possessed expertise in executing physical plans expeditiously and at minimum cost. More important, however, was their expertise in understanding the demand side of the land market — understanding, that is, which particular principles of function, quality, and aesthetic design could be applied to a project in order to yield the maximum economic return. In other words, they knew what would sell on the market.⁴⁸

Given the division of labor between government and developers, it is highly unlikely that government possessed any aptitude for assessing demand. Because of the politics of the Redevelopment Act, government was under a mandate to eliminate a slum; they had to *do* something, and do it with the participation of private sector developers in a way that allowed the developers to profit. Thus, government was in the position of depending on the developers for an essential element (demand

47. *Berman v. Parker*, 348 U.S. 26, 34-35 (1954). The district court below also seemed to believe that this was the problem. See *Schneider v. District of Columbia*, 117 F. Supp. 705, 714, 719, 721 (D.D.C. 1953).

48. *Berman*, 348 U.S. at 34. An incisive analysis of the dynamics of the market for political action in terms of the rational interests, needs, and opportunities of the several categories of participants (vote-seekers, bureaucrats, producers, and consumers) is set out in RANDALL BARTLETT, *ECONOMIC FOUNDATIONS OF POLITICAL POWER* (1973). Bartlett's analysis includes a revealing discussion of the information assets that producers can offer in this market for political action. *Id.* at 65-75.

in the land market) of the information required for deciding what was to be done.⁴⁹

The government's vulnerability to the developers was particularly acute because of the incentives faced by both government and developers. The most rational general course of action for the members of the Redevelopment Agency and the Planning Commission was the maximization of the security of their position.⁵⁰ This was most successfully achieved through the dual strategy of preserving or expanding the workload of their agencies and making the least controversial decisions possible.⁵¹

With respect to the Southwest Washington mandate, the most sweeping redevelopment project would have resulted in the largest payoff in terms of workload and consequent funding and staffing. The developers, of course, would similarly prefer the most sweeping solution because of the increased opportunities for profit. Moreover, the developers would prefer, again for profit reasons, a solution which incorporates more upscale uses in the redeveloped project area.

Given the overall nature of the slum problem, it is unlikely that a decision could have been implemented that would have satisfied everyone affected and thereby avoided any controversy. The least controversial solution would have been the one that minimally offended those most able to vent their opposition publicly. Determining their identity would not have been difficult. The developers were well organized through their trade group and possessed both the financial means and the skills required to make their views known. Conversely, the impoverished slum residents did not possess the organization, the means, or the skills to participate on the hustings. Elected officials and those members of the general public who placed the slum on the political agenda would find acceptable any measure that would eliminate the Southwest Washington eyesore. Politically, then, government maintained a strong incentive to adopt a redevelopment project preferred by the developers.

In terms of the process, government was vulnerable to the developers. The developers possessed the means to achieve a dominating presence, both in public forums and through lobbying *ex parte* in the complex administrative processes by which the redevelopment plan emerged. This presence was far greater than any other interested individuals or groups could bring to bear.⁵² The developers' means had two aspects. The first aspect was the economic means to purchase the services of enough

49. *Id.* at 27-37, 70-75.

50. *Id.* at 21-22.

51. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36-42 (1971). See also BARTLETT, *supra* note 48, at 70-72.

52. BARTLETT, *supra* note 48, at 132-56.

appropriately skilled individuals to maintain sheer presence. The second was the crucial knowledge about land market demand that the government lacked but needed in order to make its determinations; this was the developers' means to use their presence advantageously. Achieving dominating presence is the mechanism by which the familiar phenomenon of "capture" arises, and developers had the opportunity to engage in capture.

Finally, the developers had the opportunity to maximize their profits not only through the scale and economic level of the redevelopment plan, but also through the distribution of costs. A favorable cost distribution could be accomplished through maximizing the government's involvement in implementing the plan physically by inducing the government to administer as many site clearing and site preparation functions as possible and then by minimizing the proportion of the costs of the functions that the government would have otherwise attempted to recapture when selling the cleared and prepared parcels to the developers. The developers possessed a powerful means of influencing this price because of their functional monopoly over demand information. They could manipulate this information by threatening not to participate in the project on the asserted grounds of unprofitability.

From the fundamental nature of the process established by the Redevelopment Act, a basis exists for predicting what sort of redevelopment scheme might emerge. This prediction can be tested by considering the contours of what actually took place in the aftermath of the sweeping blessing of urban renewal that the Supreme Court provided in *Berman v. Parker*. The extensive litigation that the project engendered provides a revealing body of information.

The Redevelopment Land Agency carried out its renewal of Southwest Washington in two principal stages. The *Berman* litigation involved a dispute over the first stage, "Area B."⁵³ According to the judicial opinions that resulted from the *Berman* dispute, the plan for Area B at the time of this dispute called for a renewed area with approximately the same population level as before, but with a mix of low and moderate income residents.⁵⁴ Moreover, the Area B plan called for no construction of welfare housing.⁵⁵ Necessarily, the project as initially planned would have resulted in the displacement of at least some of the low income pre-project population.

The later redevelopment of the larger Area C generated litigation over the question of whether the Agency could change the designated use of one parcel without the approval of the owners of adjacent parcels

53. *Berman v. Parker*, 348 U.S. 26, 30 (1954); *Schneider v. District of Columbia*, 117 F. Supp. 705, 708 (D.D.C. 1953).

54. *Schneider*, 117 F. Supp. at 724.

55. *Id.*

already redeveloped according to the plan.⁵⁶ The judicial opinions generated by this dispute provide further glimpses of what happened to Southwest Washington in the aftermath of *Berman v. Parker*. The developers took advantage of their opportunity to capture both the administrative and the legislative processes. It appears that the developers actually displaced the Planning Commission in formulating the area plan.⁵⁷ In addition, the developers successfully lobbied to prevent the enactment of legislation that would have resolved the Area C dispute in favor of change.⁵⁸ Because of this successful capture, the general approach to the redevelopment of the slum area evolved rather quickly from providing for low to moderate income uses to providing a substantial, if not predominant, proportion of economically upscale uses.⁵⁹ Consequently, there must have been considerable further displacement of the former residents of the renewal area.⁶⁰

The developers also succeeded in controlling their costs. With governmental expenditures in the renewal area nearly equal to private ex-

56. There seemed to have been no challenge to the validity of the plan for Area C in advance of its implementation. After nearly full implementation, however, the residents of an affluent town house development constructed in Area C as part of the renewal project protested the action of the Agency in redesignating an adjacent parcel from semi-public or church use to low and moderate income housing. *Hoeber v. Redevelopment Land Agency*, 412 F. Supp. 211, 212 (D.D.C. 1976), *rev'd sub nom. L'Enfant Plaza Properties, Inc. v. Redevelopment Land Agency*, 564 F.2d 515 (D.C. Cir. 1977). The federal district court held that the Agency was required to take into account the impact on adjacent property of a change in the redevelopment plan and to obtain the written consent of any landowners or lessees adversely affected before implementing the change. *Hoeber v. Redevelopment Land Agency*, 483 F. Supp. 1356 (D.D.C. 1980).

57. The original Area C plan, prepared by the Planning Commission staff, was limited to the rehabilitation of existing structures with the area remaining predominately low income. The final plan, prepared by outside architects, adopted a predominately economically upscale concept of a "new town in the city" because of the "higher" economic potential of the area. *Hoeber*, 483 F. Supp. at 1360-61.

58. Patrick Tyler & LaBarbara Bowman, *The Scars of a SW Housing Struggle*, WASH. POST, January 14, 1980, at A1.

59. *Hoeber*, 483 F. Supp. at 1360-61.

60. The several judicial opinions that the Southwest redevelopment generated are cryptic on the matter of displacement. The Area B plan called for the same population post-redevelopment as pre-redevelopment with, however, a goal of raising the average income level in the area. *Schneider v. District of Columbia*, 117 F. Supp. 705, 724 (1953). Necessarily, there would have been at least some permanent displacement of former Area B residents, particularly the least affluent. The Area C plan, although it included some low income housing, called for a substantial upscaling of the area. *Hoeber*, 483 F. Supp. at 1361. There was permanent displacement of Area C residents as well. It is clear that in 1980 there was a considerable public perception of displacement; the renewal area had become "a synonym for black removal from the center city." Tyler & Bowman, *supra* note 58, at A1.

penditures,⁶¹ there was apparently a considerable shift of the physical work load to government. Moreover, government failed to capture the costs that it incurred, either by selling prepared development sites at a price that recaptured acquisition and preparation expenses⁶² or by recapturing some of these costs through increased property tax revenues.⁶³

These glimpses suggest that the renewal of Southwest Washington conformed closely to what might have been predicted from the structure and dynamics of the renewal process established by the Renewal Act in 1946. The apparent governmental subsidy of the development that occurred strongly indicates that no economic justification existed for the particular, massive role that government played in this renewal. By taking title to the land in the renewal area and clearing and preparing it for development, the Redevelopment Land Agency performed the important initial step of assemblage, thereby eliminating the possibility of a holdout problem. Because the developers enjoyed considerable influence in the planning process, the configuration of the prepared parcels was suitable. Yet, a willing seller of assembled and prepared parcels could not sell them without "writing down"⁶⁴ the acquisition and preparation costs. The developers had an opportunity to manipulate their knowledge of market demand. It is unlikely, however, that they would forgo an opportunity to develop at a profit if they could do so at a purchase price equal to the agency's cost. If the developers could not profit at this price, then clearly no market demand existed for the uses that the redevelopment plan designated for these parcels.

Moreover, it is beyond comprehension that the major financial institutions would have "redlined" the area's major developers. In addition, the examples of Morris and Schneider, as well as an even more compelling example discussed below, indicate that individuals in the Southwest Washington "slum" were willing to invest in the maintenance and im-

61. By 1973, private investment in the redeveloped area of southwest Washington totalled "over \$265 million." Public expenditures totaled "less than \$230 million." *Hoeber v. Redevelopment Land Agency*, 483 F. Supp. 1356, 1367 (D.D.C. 1980).

62. Apparently, the Redevelopment Land Agency normally "wrote down" these acquisition and preparation costs before selling parcels to private developers. *L'Enfant Plaza Properties, Inc. v. Redevelopment Land Agency*, 564 F.2d 515, 519 (D.C. Cir. 1977). It is curious that public expenditures amounted to approximately 87% of private expenditures in an undertaking in which "private enterprise . . . shall be given a preference over any public redevelopment company" in the transfer of development parcels. Redevelopment Act § 7(g).

63. It appears that the *difference* in tax receipts attributable to redevelopment (adjusting 1953 receipts to 1973 dollars) between 1953 and 1973 was approximately \$4 million per annum in 1973. *Hoeber*, 483 F. Supp. at 1367 n.37. This is hardly a bounteous annual return on a total public investment of some \$230 million.

64. *L'Enfant Plaza*, 564 F.2d at 519.

provement of their properties. Thus, it is unlikely that a substantial free rider problem existed in the area.

It was certainly within the realm of possibility that there was a holdout problem in Southwest Washington. Eliminating the possibility of such a problem, as the Redevelopment Land Agency actually did, however, did not alone induce redevelopment in accordance with the pattern of uses that the plan designated. To accomplish this, the Agency found it necessary to subsidize the developers as well. What remains is the conclusion that the cause of the Southwest Washington slum was a lack of demand. No demand existed for any land uses other than the "slum" uses already present. Therefore, the economically proper response was not a public-private partnership engaged in a massive redevelopment project. Rather, it was the transfer of sufficient wealth from the rest of society to the slum dwellers to facilitate demand for politically acceptable land use.

The sweeping and uncritical judicial approval of the Washington, D.C. redevelopment scheme had profound consequences. Given the pattern of uses which the redevelopment plans established, the subsidy that resulted from the "writing down" of the development parcels amounted to a transfer of wealth from the population at large to the affluent. The Supreme Court's ratification of the Redevelopment Act established a hierarchical and antidemocratic redevelopment process, which inevitably led to a perverse subsidy of the affluent.

Because of the pervasive influence that a Supreme Court decision has on other courts, perhaps the most substantial consequence of *Berman v. Parker* flowed from the radical conceptualization of land rights that is implicit in the *Berman* opinion. The Court expressly and consciously stretched the meaning of the Fifth Amendment phrase "public use" to include a private use with a consequent public benefit.⁶⁵ There are, however, two aspects to using governmental power to serve the public benefit: The negative aspect of exercising public power to prevent actions that are harmful to the public good and the positive aspect of exercising public power to take actions that advance the public good.

The district court recognized the considerable conceptual complexity of the "public benefit" and concluded that relevant differences existed between its two aspects. It held that "public use" could properly include a private use with a consequent public benefit, provided that the public benefit was served in a negative way, such as preventing an ongoing harm to the public welfare by eliminating "slum" uses of land.⁶⁶ The district court declined, however, to extend the eminent domain power

65. *Berman v. Parker*, 348 U.S. 26, 33-34 (1954).

66. *Schneider v. District of Columbia*, 117 F. Supp. 705, 715 (D.D.C. 1953).

to include takings of non-slum property for the purpose of advancing the public welfare because "the poor are entitled to own what they can afford."⁶⁷

The Supreme Court's collapsing of these two aspects is doubly radical. First, the traditional concept of strong individual rights in confrontation with public power contemplates a regime of highly determinate property entitlements carrying a strong security of tenure, with the public power of eminent domain functioning as an exceptional circumstance. The root of this traditional concept is individual liberty. The Court's expanded concept of the eminent domain power contemplates a regime of highly contingent property entitlements carrying a security of tenure that is determined only by the momentary, shifting conception of the public good. The root of this alternate concept is social utility. The district court, in rejecting this alternative concept, recognized its radically different nature: "One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed."⁶⁸

The Supreme Court's concept is even more radical in operation. As discussed, the momentary, shifting conception of the public good is strongly a function of the power of the economic elite to capture the policy determining organs of government. The liberty based political philosophy of strong individual rights necessitates an equality of rights.⁶⁹ As John Rawls has recognized, liberty in the abstract is of little value politically without the means to enjoy liberty.⁷⁰ Anatole France depicted the matter ironically: "The majestic egalitarianism of the law . . . forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread."⁷¹ The practical effect of the power of the economic elite to capture government will be a shift of societal wealth to the affluent. The practical realization of equal liberty will be a casualty.

If the most substantial consequence of *Berman* is its radical reconceptualization of the eminent domain power, its most unfortunate consequence is its ratification of a redevelopment process that displaces impoverished residents of the slum. The Redevelopment Act did not require that housing be provided, either in the project area or elsewhere, for those residents whose residences were to be taken and razed.⁷² Clearly,

67. *Id.* at 719-20.

68. *Id.* at 724.

69. JOHN RAWLS, A THEORY OF JUSTICE 243-51 (1971).

70. *Id.* at 204.

71. OXFORD UNIVERSITY PRESS, THE OXFORD DICTIONARY OF QUOTATIONS 217 (3rd ed. 1980).

72. The Redevelopment Act made only two provisions for people who would be

the low and moderate income housing that the redevelopment plan did provide could accommodate far fewer people than the number who were displaced. Many of these people, of course, could afford only "slum" housing. As a result, the project did little more than eliminate the symptoms of the problem, the eyesores in Southwest Washington, without addressing the problem itself — poverty. By displacing people without providing for them, the project could only shift the problem elsewhere.

The experience of one displaced resident of the project area is a microcosm of the impact of the redevelopment on the project area's residents. In 1951, Mayme Riley purchased a residence in Southwest Washington, in what the redevelopment plan called Area B.⁷³ Mrs. Riley gave a down payment of \$300 and executed notes secured by three liens of mortgage on the residence in the face amount of \$9,652. After her purchase, rather than allowing her property to deteriorate, Mrs. Riley spent \$877 on repairs and improvements.

In 1954, when the process of razing Area B reached Mrs. Riley's neighborhood, the Redevelopment Agency instituted eminent domain proceedings against her property. Having spent or incurred obligations in the amount \$10,729, Mrs. Riley received a condemnation award of \$7,000. Because in 1954 she still owed \$8,902 on the three notes, the condemnation action left her with no house, an outstanding balance due on the notes of \$1,902, and nothing to show for the \$1,927 that represented the sum of her down payment, her paydown of the notes, and the cost of the repairs and improvements that she had made.⁷⁴

displaced. It provided that the District of Columbia Commissioners "shall satisfy themselves" at the time of adopting the redevelopment plan that housing would be available in the future for the displaced. Second, it provided that the displaced "shall be given preference" for vacancies in any public housing that might be available. Redevelopment Act § 8. It is clear that these provisions were not adequate. See Tyler & Bowman, *supra* note 58, at 1.

73. The facts of this episode are set out in *Riley v. Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957) and STAFF OF HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 86-88 (Comm. Print 1964) [hereinafter COMPENSATION STUDY].

74. Sadly enough, it would seem that the award did reflect the objective fair market value of her property. The fact that this amount fell far short of her outstanding debt and her expenditures can be attributed to the unsurprising fact that she must have paid exorbitant interest rates for her loan. This is a circumstance concealed by the all too common practice of the lender obtaining the usurious portion of the interest up front by forcing "red-lined" credit applicants to make notes in favor of the lender, the face amounts of which substantially exceed the loan proceeds. The astonishing rates by which the lender discounts these notes on the secondary market are a clue that this indeed is the practice. For a discussion of the technique of frontloading excess interest into the face amount of the note, see CHARLES J. GOETZ, CASES AND MATERIALS ON LAW AND

Having lost her economic stake in society, Mayme Riley now faced displacement, with rather diminished prospects of purchasing a new residence.⁷⁵

Here, in stark detail, is the consequence of a judicial doctrine that permits an expansive reach of the eminent domain power. Mrs. Riley faced formidable obstacles, including a commercial finance system that left her to the tender mercies of usurers and a physical milieu in which an individual might reasonably be discouraged from investing. Despite these obstacles, she fully lived up to the ideal citizen of political rhetoric, the strong, self-sufficient individual working hard within the system. The system established by the Redevelopment Act decided, however, that what she was doing was not good enough, that her home should be razed, and her land "sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed."⁷⁶

The classic liberal value system provides a strong basis for criticizing what happened to people like Mayme Riley. An even broader criticism is possible by considering more closely the implications of what was happening in Southwest Washington. Although the complaints of Morris, Schneider, and Riley represent only three parcels out of the extensive redevelopment area, their laments nevertheless suggest a reality far more complex than the utterly bleak portrayal that appears in the *Berman* opinion. These individuals *wanted* to be located there. Given human nature, it is likely that they wanted to be there because other neighbors wanted them to be there.

The point is that the mere recitation of statistics that focus solely on physical condition falls short of fully portraying reality, especially when a substantial component of that reality is psychological in nature. In this case, the psychological component illustrates the emotional attachment Schneider, Morris, and Riley had with their property. Their response to the takings represents their particular stake in a cohesive community. The point, though, is not that this psychological factor was necessarily present in the blighted Southwest Washington renewal area (although some thirty years later, people apparently remembered it as having been a cohesive community).⁷⁷ Rather, the formal record of this

ECONOMICS 213-17 (1984). For a discussion of the large discount rates in the market for credit that Mayme Riley faced, see COMPENSATION STUDY, *supra* note 73, at 86.

75. Mrs. Riley challenged the eminent domain award that the Redevelopment Land Agency offered and brought an appeal of a judgment for \$7,000. The court of appeals set the judgment aside and remanded. *Riley v. Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957). The matter was settled, with the award increased by \$850. COMPENSATION STUDY, *supra* note 73, at 86.

76. *Schneider v. District of Columbia*, 117 F. Supp. 705, 724 (D.D.C. 1953).

77. *Tyler & Bowman*, *supra* note 58, at 1.

renewal project indicates that whether a communal milieu existed was not a matter of concern in the long series of public decisions that led to the physical obliteration of the area and the dispersal of its residents.

Especially among the poor, the existence of a matrix of mutually shared values and mutually shared concern and support is a necessary condition, not just to psychic well-being, but to physical survival itself. The wealthy can purchase in abundance all that they need for physical survival. The poor must often depend on a web of mutual support consisting of a nonmonetary exchange of goods and services with each individual contributing to the others whatever meager abundance and special talents he might have. When psychic and service exchanges exist, they can mutually and synergistically reinforce, creating a milieu the value of which far exceeds what the physical reality might suggest. When this milieu is destroyed and its members scattered, it is irretrievably lost.⁷⁸

The failure of the decisionmaking process by which Mr. Schneider's and Mr. Morris's stores and Mrs. Riley's residence were destroyed to take into account whether a community existed in the renewal area had a dual effect. The potentially substantial value of community to its members could not enter into the measure of eminent domain compensation that each received. Schneider and Morris were not compensated for lost "goodwill," and Riley was not compensated for lost "subjective value."⁷⁹ In addition, the existence of a community could not count as a relevant factor in choosing the method of correcting the eyesore, whether by physical destruction and the scattering of the residents or by physical rehabilitation and locational continuity for the residents. Neither the value that a community gives to its members nor the value the rest of society derives from the existence of a community was of relevance.

The issue of community was formally absent in the legislative, administrative, and judicial decisionmaking processes that shaped the fate of Southwest Washington. This issue expressly arose, however, in the extended controversy over a redevelopment project in Detroit that

78. See, e.g., JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 192-95 (1989).

79. An individual faced with the prospect of relocation by another redevelopment project expressed the notion of sentimental value in this way:

I been living in this neighborhood for over forty-six years, and I don't intend to move because you con artists are trying to pull a rip off. Nobody can tell me up to eighty percent of the value of that house, how much that house is worth. To me it is a million dollars. My house has a brand new bathtub and I don't intend to move to a clunker, God-damned, cockroach-infested house that you pick out. I want to live on Kanter and I love every rotten board in that house.

Id. at 63.

took place some thirty years later. In 1981, the Michigan Supreme Court decided *Poletown Neighborhood Council v. City of Detroit*.⁸⁰ The redevelopment in dispute in *Poletown* had its origin in a General Motors Corporation offer to locate an assembly plant for luxury automobiles in Detroit if the city would provide the site. Acting in an environment of economic decline, the city agreed to take a site by eminent domain that met the locational criteria specified by General Motors, to clear the site and install specified transportation and utility infrastructure, and to transfer the site to General Motors for a price that amounted to approximately four percent of the city's anticipated acquisition and site preparation costs of \$200 million. In addition to providing the site on extremely favorable terms, the agreement granted General Motors tax abatement for twelve years.

The site, however, encompassed a substantial portion of "Poletown," a predominantly Polish enclave that straddled the Detroit-Hamtramck border. In response, residents of Poletown formed the Poletown Neighborhood Council, which served as the vehicle for a two-front resistance to the project. The Council engaged in an extended political fight that generated national media attention.⁸¹ The Council also brought a legal challenge to the proposed project that raised two issues on appeal to the Michigan Supreme Court: (1) that the project amounted to an impermissible taking for private use and (2) that the city had impermissibly failed to account for the loss of a cohesive community that the project would cause.⁸²

Relying explicitly on *Berman v. Parker*, the Michigan Supreme Court upheld the validity of the project in a conclusory opinion that is reminiscent of the United States Supreme Court's conclusory and almost eager ratification of the Washington, D.C. project.⁸³ The Michigan Supreme Court's formulation of the issue was all but self-answering:

This case raises a question of paramount importance to the future welfare of this state and its residents: Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?⁸⁴

80. 304 N.W.2d 455 (Mich. 1981).

81. The story of the ultimately unsuccessful citizen resistance is chronicled in WYLIE, *supra* note 78.

82. *Poletown*, 304 N.W.2d at 458, 460.

83. *Id.* at 459. Two justices, however, dissented in strong terms. *Id.* at 460-64 (Fitzgerald, J., dissenting); *id.* at 464-82 (Ryan, J., dissenting).

84. *Id.* at 457 (citation omitted). It is not clear why the court left out mom and apple pie.

In rejecting the contention that the project amounted to an impermissible taking for a private use,⁸⁵ the court engaged in considerably strained reasoning. The court first asserted that "condemnation for a private use cannot be authorized whatever its incidental public benefit."⁸⁶ It then found that the condemnation was for the primary benefit of the public.⁸⁷ Thus, the court held that because the benefit to the private interest was "merely incidental," the eminent domain taking was valid even though, to return to the court's initial assertion, it was for a direct private use, which "cannot be authorized."⁸⁸

The Neighborhood Council used the Michigan Environmental Protection Act⁸⁹ to raise the issue of loss of community. The Act allows citizen actions against public and private entities "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."⁹⁰ The Council contended that, because the project would "have a major adverse impact on the adjoining social and cultural environment which is referred to as Poletown," it would destroy a natural resource in violation of the Act.⁹¹ The court rejected this contention summarily: "Given its plain meaning, the term 'natural resources' does not encompass a 'social and cultural environment.'"⁹²

The *Poletown* opinion is strikingly conclusory. Note the difference between the court's reading of "public use" and its reading of "natural resources." The "plain meaning" of "public use" would seem to be "definitely not a private use." The court, however, engaged in an expansive reading of that term while it engaged in a constrictive reading of "natural resources" without offering an explanation for this analytical difference.

The court was similarly conclusory in considering whether a public benefit flowed from the private use of the Poletown parcel. The court set out a rather rigorous test: "Where, as here, the condemnation power

85. The challenge was brought under the taking clause of the Michigan Constitution, the language of which is nearly identical to that of the Fifth Amendment to the U.S. Constitution: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." MICH. CONST. art. X, § 2 (1963).

86. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981).

87. *Id.* at 459.

88. *Id.*

89. MICH. COMP. LAWS § 691.1201 to -.1207 (1970).

90. *Id.* at § 691.1202(1).

91. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 460 (Mich. 1981).

92. *Id.*

is exercised in a way that benefits specific and identifiable private interests, a court inspects *with heightened scrutiny* the claim that the public interest is the predominant interest being advanced.”⁹³ Its “strict scrutiny,” however, amounted to this: “If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. . . . We hold this project is warranted on the basis that its significance for the people of Detroit and the state has been demonstrated.”⁹⁴

The dogged, passionate, and well-publicized resistance by the Poletown residents in every possible forum ought to have alerted the Court to the fact that strongly held values were at stake and that some scrutiny of the claimed public benefit was required. The court could have weighed the loss of community as a cost borne by the Poletown residents as members of the public whose benefit was the criterion for judging the project’s validity. The court could also have weighed the loss to the public at large of having a cohesive, mutually supportive community in its midst. Instead, the court ignored these values in an opinion that amounts to a bloodless discussion of the paramount legislative and executive roles in determining the public interest and the dominant weight of economic factors in measuring the public interest.

Even if the court had engaged in a scrutiny of the claimed public benefit confined only to economic factors, it would have found much to question. The court *assumed* in its statement of the issue that the project would “promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state.”⁹⁵ Yet, jobs add households to a municipality, and households demand municipal services. The principal source of local government revenue is the property tax. The property tax yield from a single residence, except in the case of an affluent household, falls considerably short of paying for the governmental services that the residence consumes. The balance must be made up in taxes on industrial and commercial property. The Detroit-General Motors agreement granted the maximum tax abatement allowable under Michigan statutory law.⁹⁶ Adding to this loss of tax revenues the over \$200 million net cost to the city in procuring and preparing the project site, the net effect of the project on the flow of public revenues, would seem to have been highly questionable.

The *Poletown* opinion clearly demonstrates that the Michigan Supreme Court failed, just as the United States Supreme Court failed in *Berman*, to address the critical issues that these public-private redev-

93. *Id.* at 459-60 (emphasis added).

94. *Id.*

95. *Id.* at 457.

96. *Id.* at 470 (Ryan, J., dissenting).

opment enterprises raise. Instead, the Michigan Supreme Court simply added its enthusiastic endorsement to a kind of enterprise that, because it is so strongly shaped at the behest of the economic elite, requires independent judicial scrutiny and not judicial boosterism.

Poletown exemplifies the influence that *Berman v. Parker* had over subsequent judicial responses to challenges of mass-scale urban redevelopment projects. This influence was reminiscent of the impact that the Supreme Court's 1926 decision in *Village of Euclid v. Ambler Realty Co.*⁹⁷ had over the earlier judicial response to the validity of the power of local government to engage in the regulation of private land use. In *Poletown*, as in *Berman*, the judiciary ratified a decisionmaking process that was carried out by a coalition among local political leaders, the economic elite, and the bureaucracy of planning experts who decided on behalf of a substantial segment of the population that the land on which they lived must be put to a more economically intensive use. *Poletown*, as does *Berman*, induces a nagging suspicion about the validity of its assertions that a redevelopment project will generate a large net benefit to the public.⁹⁸ *Poletown* goes further than *Berman* by expressly rejecting what *Berman* impliedly rejected — community as a relevant value in the decisionmaking process.

II. CONSEQUENCES

The foregoing discussion performs several functions. It abundantly supports the thesis of *Planning for Serfdom* which asserts that the practice of urban redevelopment amounts to a hierarchical reality operating within a social context in which the rhetoric of classic liberalism dominates the style of political discourse.⁹⁹ Within this hierarchical reality, the economic elite deploy their power to capture the organs of government. This capture enables the economic elite to operate behind a facade of governmental regularity to achieve private profit at the cost of the integrity of the classic liberal values that underlie the formal structure of our polity.

In addition, the foregoing discussion reveals that, even accepting the validity of a political-economic system formed on hierarchical lines,

97. 272 U.S. 365 (1926).

98. New jobs mean new residents, but these residents cannot be taxed enough to cover their demand for public services. Thus, the industrial and commercial activity that accompanies them must make up the difference. Ironically, however, the industrial activity is brought by tax concessions. The result is a downward fiscal spiral in which government offers fewer services, followed by socioeconomic downscaling as the more affluent workers flee to "nicer" areas nearby.

99. For a contrast between rhetoric and reality in Indianapolis, see MALLOY, SERFDOM, *supra* note 1, at 12.

substantial reasons exist for questioning the integrity of the performance of that system. The justification for a hierarchical system is founded on the theory of division of labor and reward. This theory holds that certain members of society are more capable than others of directing the political-economic system to achieve the most efficient allocation of society's resources. Because the material wealth of society is a strongly held value, those people who increase society's wealth should wield power and enjoy economic rewards in proportion to their managerial talents.

As the facts of the Southwest Washington and Detroit disputes suggest, the most likely economic effects of these two projects were an economically inefficient subsidy of private enterprise and a substantial subtraction from the flow of public revenues. Moreover, the justification of a hierarchical order, by positing that some members of society are better than others at wielding power, implicitly assumes that these elite will wield their power for the benefit of society. If "society" means an organic whole, then these projects disserved the economic good of society. If, alternatively, "society" is defined in terms of each of its members, then these projects impoverished a substantial number of society's members, particularly those who were already at the lower end of the economic scale.

The previous discussion further reveals the importance of the judiciary in the process of urban redevelopment. The foregoing reconstruction of what occurred in Washington and Detroit comes almost entirely from the information contained in the judicial opinions that disposed of challenges to these projects. The courts, necessarily aware of the actual and potential harm that these projects entailed, nevertheless unequivocally and enthusiastically rejected these challenges. The doctrines that the judiciary thereby deployed to support their decisions embedded in the law a legitimacy for a hierarchical order that facilitated the further development of hierarchical institutions and more securely embedded them into the structure of the political order.

This emergent law of urban redevelopment is typical of the shape of judicial doctrine generally. Gerald Frug, for example, has brought into sharp focus the hierarchical conceptualization that dominates corporate and administrative law and governs our principal structures of private and public collective action.¹⁰⁰ Frug has also demonstrated that our cities themselves are not the principal structures of collective action. Despite the power that the governments of Washington and Detroit wielded over the unfortunate inhabitants of the redevelopment areas, under United States law, cities are largely powerless creatures of the state. In these redevelopment episodes, the city governments clearly acted

100. Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) [hereinafter Frug, *Ideology*].

as functionaries implementing the purposes of the larger economic order. Had these cities possessed greater power, the possibility existed that they might have functioned in a more communal manner, as vehicles for achieving the collective aspirations of all of their citizens. What actually took place, however, is consistent with Frug's argument that the law, in rendering the city powerless, has facilitated the "evolution of liberalism . . . as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state."¹⁰¹

Finally, the foregoing discussion shows that Malloy's strong focus on the values of classical liberalism makes a further consequence of the practice of urban redevelopment less visible, the gratuitous destruction of the physical locus of vibrant local communities and the displacement of their members by scattering them beyond the possibility of reforming their communal bonds. Indeed, in lamenting the "ever increasing trends toward central planning, communitarianism, and statism,"¹⁰² Malloy seems to reject community either as a phenomenon of value to, or as a source of positive values for, our political order.

The foregoing discussion has tried to bring into focus what Malloy deems to be irrelevant. The discussion that follows presents the argument of this essay and takes as its point of departure not the consequent erosion of the individualist values of classic liberalism, but the consequent loss of community. It shows that the way we go about rebuilding and renewing the cores of our cities is destructive of community and that the courts reject the proposition that this destruction ought to carry weight in disposing of the challenges to the validity of redevelopment projects. In a political culture in which rhetoric is dominated by classic liberal values, the obvious response to this focus is, of course, the "So what?" question. Even granting that there is something of value to community that is not accounted for in the classic liberal cosmology, why does it matter that these projects destroy communities? Isn't this loss, after all, nothing more than the necessary and bearable cost of having a polity that our "founding documents" seem to specify? This polity is founded on strong principles of individual rights, individual autonomy, and *ex ante* social justice that continually acts out the liberal project of the Enlightenment.

The short answer to this question, one that the ensuing discussion will attempt to develop in detail, is that community is a symptom of a process that is politically, and therefore constitutionally, important on

101. Gerald Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059, 1088 (1980) [hereinafter Frug, *The City*].

102. MALLOY, *SERFDOM*, *supra* note 1, at 9.

two counts. First, this process is derivatively important because it is both necessary to the realization of the individualist values of classic liberalism and necessary to the attenuation of the impact of the hierarchical values that inevitably arise in political society. Second, this process is directly important, both in the value of the function that it can perform in the ongoing workings of political society and in the substantive values that it can generate, because it is a necessary element of the makeup of the polity.

Before proceeding with a development of this answer, it is helpful to engage in a brief definitional exercise. Implicit in the forgoing discussion is that a sharp dichotomy exists between two modes of existence, the communal on the one hand, and the societal on the other hand. An individual whose existence is marked by the communal mode lives in a milieu that is intimate in scale and in which interpersonal interactions are marked by a mutuality of concern. Values tend to be homogeneous and appear to arise from "below," that is, from the interactions of the community members themselves. The rhetoric of justice in this milieu tends toward the *ex post*.

In the societal mode, by contrast, the milieu is large and impersonal in scale, a milieu in which interpersonal interactions are transactional and consist of autonomous individuals pursuing their own interests and goals with little regard for the interests of others beyond a mutual commitment to the rules of fair play. Values tend to be heterogeneous and appear to come from "above" in a hierarchical manner that provides little scope for influence by any one individual. The rhetoric of justice in this milieu tends toward the *ex ante*.

In reality, of course, an unbroken spectrum of possibilities exists between the polar alternatives of community and society, with most individuals finding themselves in a mixed milieu that exhibits characteristics of both the modes. In order to sharpen the distinctions that the ensuing analysis attempts to make, however, it will proceed on the assumption that the milieus in which people actually exist tend to cluster around one pole or the other of the communal-societal spectrum.

III. THE MEANING OF THE ENVIRONMENT

The answer to the "So what?" question begins by examining the phenomenon that people invest physical objects with meaning. More particularly, throughout history and across a wide range of cultures, we do not trust our physical environment simply as a passive, accidental, and neutral context whose particular characteristics are a receded background to the existence that we act out. Cultures as diverse as the ancient Greeks and contemporary Native Australians construct through their natural environment the meaning that lies at the heart of what is culturally sacred.

Many of the familiar Greek myths recount how prominent features of the natural landscape came into being through the actions and interactions of the gods and heroic mortals who peopled mythical times. Myth, however, embodies the cultural consciousness. "A myth is a way of making sense in a senseless world. Myths are narrative patterns that give significance to our existence."¹⁰³ These particular stories define the natural environment as an essential component of Greek cultural meaning.

The Songlines of the Native Australians are functionally identical stories about the Australian landscape, stories that are also set in a mythical time, and that also transform the landscape,

the desert, which Europeans experience as a dreary, trackless waste, an environment filled with exciting, meaningful physical features, populated with invisible spirits, and crisscrossed with the meandering tracks of ancestral beings. Where Europeans find a dead landscape, the Aborigines live in a theater of energy. They are never bored in the desert. . . . For the Aborigines, any journey in the desert must resemble the excitement of devout pilgrims visiting the holy places in Jerusalem.¹⁰⁴

The meaning of the environment to the Native Australians is the substance of their cosmology.

This human habit of investing meaning is not limited to the natural environment. We invest the built environment with meaning as well, from the private residence where the significant family events occur to the public building where the significant community events occur. For example, a particular church where many Poletown residents had worshiped for most of their lives became the center of the resistance campaign for the Detroit-General Motors project. Even after the surrounding neighborhood had already been demolished, the resistance continued with Poletown residents occupying the church up to the moment that its demolition began.¹⁰⁵

Because the built environment is, by definition, constructed rather than given, this meaning and the processes by which it arises are abundantly complex. When we experience an architectural artifact, we become involved in an interactive process.¹⁰⁶ The first element of this process comes from the fact that the architect designed the building and the

103. ROLLO MAY, *THE CRY FOR MYTH* 15 (1991).

104. EUGENE V. WALTER, *PLACEWAYS: A THEORY OF THE HUMAN ENVIRONMENT* 137-38 (1988).

105. WYLIE, *supra* note 78, at 153-91.

106. See Umberto Eco, *Function and Sign: Semiotics of Architecture*, in *STRUCTURES IMPLICIT AND EXPLICIT* 131 (James Bryan & Rolf Sauer eds., 1973).

builder built it for use. Through a powerful connotative process, the building thereby conveys to the observer an ideology that is implicit in its function and that this function is normatively proper.¹⁰⁷ To say that a building connotes an ideology of function — to say that it is “built” — is to say that this connotative meaning is aesthetic in nature in the strong sense of enlightenment as distinguished from pleasure.¹⁰⁸ A building, that is, “can give new insight, advance understanding, and participate in our continual remaking of the world.”¹⁰⁹

Simultaneously, however, the building is malleable, giving rise to the second element of this interactive process. We, as “readers” of the building, have the power to attribute a meaning to it which is not necessarily a consequence of the building’s function.¹¹⁰ This attributed meaning can reinforce the functional ideology that the building connotes, it can be entirely independent of it, or it can be strongly in contention with it.¹¹¹ The meaning that the reader experiences arises out of the interaction of the connoted meaning of functional ideology and the meaning that the reader attributes. This experienced meaning is necessarily aesthetic as well. Apart from the substance of this complex, interactive aesthetic meaning is its impact. A building, because of its sheer physical presence, necessarily alters our environment. It “bulks large.” Because of this, this aesthetic meaning bulks large as well. Indeed, it can “inform and reorganize our experience.”¹¹²

Closely connected to the meaning of buildings is the meaning of the interior and exterior space that buildings create. Here, the meaning arises more directly from the individual’s activities in that space, although the architectural configuration, by determining the possibility of these activities, can shape this meaning indirectly.

A place has no feelings apart from human experience there. But a place is a location of experience. It evokes and organizes memories, images, feelings, sentiments, meanings, and the work of the imagination. The feelings of a place are indeed the mental projections of individuals, but they come from collective experience and they do not happen anywhere else. They belong to the place.¹¹³

In turn, this experience in the space created by a built environment, and its meaning, can shape the individual, just as the meaning of a

107. *Id.* at 135-36.

108. Nelson Goodman, *How Buildings Mean*, 11 *CRITICAL INQUIRY* 642, 652 (1985).

109. *Id.*

110. Eco, *supra* note 106, at 136-37.

111. Goodman, *supra* note 108, at 643.

112. *Id.* at 652.

113. WALTER, *supra* note 104, at 21.

building can shape the individual. The ancient Athenian agora provides a compelling example. According to Lewis Mumford, the "best definition of the city in its higher aspects is to say that it is a place designed to offer the widest facilities for significant conversation."¹¹⁴ The most important such facility in ancient Athens was the agora, whose "oldest and most persistent function was that of a communal meeting place."¹¹⁵ The function of the conversation that defined the city was "the making and remaking of selves."¹¹⁶ "In any generation, each urban period provides a multitude of new roles and an equal diversity of new potentialities. These bring about corresponding changes in laws, manners, moral evaluations, costume, and architecture, and finally they transform the city as a living whole."¹¹⁷

Thus, the built environment, whether buildings or space, can serve two powerful, interpenetrating functions. It can appear to us as a matrix that expresses our fundamental values, while it can also serve as a vehicle of value creation. Because these interpenetrating functions are intimately involved with the individual's fundamental values, this interaction between self and place is crucial to the individual's self-identity, functionability, and emotional state.¹¹⁸ One Poletown resident, for example, faced with the reality of relocation upon receiving some government literature describing the eminent domain process, committed suicide.¹¹⁹ Thus, the meaning of the built environment functions as a powerful connection between the values of the individual and place.

Underlying classic liberalism, and its exaltation of the individual, is a paradox. Classic liberalism gives "paramount value" to freedom, individual liberty, and individual autonomy,¹²⁰ yet the individual is a social construct. An individual's values do not arise *sua sponte*. Rather,

114. LOUIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 116 (1961).

115. *Id.* at 148.

116. *Id.* at 116.

117. *Id.*

118. Kevin Lynch, *Reconsidering 'The Image of the City,'* in *CITIES OF THE MIND: IMAGES AND THEMES OF THE CITY IN THE SOCIAL SCIENCES* 151, 153-155 (Lloyd Rodwin & Robert Hollister eds., 1984).

119. WYLIE, *supra* note 78, at 62. The suicide rate in the midwest farm belt during the financially troubled 1980s was substantially above the national average. *E.g.*, VANCOUVER SUN, Oct. 16, 1991, at A16; WASH. POST, Nov. 18, 1990, at A18. Much of this can be attributed to the shame of being perceived as a failure. *See, e.g.*, THE DAILY TELEGRAPH, May 3, 1989, at 13. Much can also be attributed to the strong meaning that the farmer ascribes to the land: "Your sense of identity and self-worth is tied up in the land." Guy Gugliotta, *Down on the Farm: The Other Depression in Rural America*, WASH. POST, Nov. 18, 1990, at A18.

120. MALLOY, *LAW & ECONOMICS*, *supra* note 4, at 95-96.

they arise through an interactive process with the social world. A social world can function communally when the individual participates mutually with others in the creation and internalization of values. Alternatively, it can function hierarchically as a world in which the individual internalizes values that appear to be anonymously created and imposed from outside and above the immediate environment. The meaning of the built environment can arise in either of these modes because the physical structure of the built environment can arise either communally or hierarchically. If the built environment — its physical configuration, its aesthetic style, and its intended and permitted functions — arises communally, the individual experiences it in a participatory way, with an acute understanding that her function is meaning investing as well as meaning consumption. In a communal mode, a place is what we make of it.

If the mode is hierarchical, the individual experiences this environment in a detached way. Her only function is to consume an imposed meaning. Because this meaning, whether it arises communally or hierarchically, connects an individual's values with place, how a place arises is intimately involved with who a person is.

Different modes exist by which the meaning of the built environment arises, and a politics of meaning is bound up with the alternative roles available to the individual in the built environment. These roles can be described in terms of a spectrum. At one end of the spectrum is the environment that arises in a purely communal mode. The ready example is the economically modest, but vibrant, urban neighborhood, which is a bounded, named place with shared agreements about public behavior and established processes for reaching these agreements. Such a neighborhood is also an organizational structure that has linkages to sources of necessary outside resources and an enduring process for resolving internal conflict.¹²¹

Farther along this spectrum is the environment that exists in a state of tension between the communal and hierarchical modes. The ready example is the regional shopping malls of the 1970s before the proliferation of malls resulted in their falling into a hierarchy catering to different socioeconomic levels. When, for any particular area, there was only "the mall," it became an inchoate latter day agora and was the central meeting place for the entire community, where Lewis Mumford's

121. SANDRA SCHOENBERG & PATRICIA ROSENBAUM, *NEIGHBORHOODS THAT WORK: SOURCES FOR VIABILITY IN THE INNER CITY* 31-48 (1980). For a description of Boston's North End in the late 1950s as just such a viable urban neighborhood, see JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 8-12 (1961) [hereinafter JACOBS, *DEATH*]. Jacobs defines the characteristics of a successful neighborhood in terms of a single principle: "[A] most intricate and close-grained diversity of uses that give each other constant mutual support, both economically and socially." *Id.* at 14.

function of significant conversation clashed with the hierarchically imposed function of retail commerce. Similarly, during the brief span of China's Democracy Revolution, the use of Tiananmen Square in Beijing was in tension with the hierarchical function for which the central government had designed and built it.

Today, of course, Tiananmen Square is the exemplar of the hierarchical space. The Acropolis, the center for the rituals celebrating the official cosmology of ancient Athens, functioned in substantial contrast to the agora. As mall owners strive to keep their spaces hermetically sealed from the disorder of the outside world and, on the inside, free from any taint of political exchange in order to foster a tension-free environment of consumption, these spaces will also become hierarchical.

The opposite end of the spectrum is reached through a phenomenon that is all too common in the United States, the dichotomous and neutral hierarchically imposed space. Modern buildings typically focus on inner space as the dimension of moral value.¹²² The exteriors of these buildings, by their neutral, meaning-rejecting design, connote an ideology that rejects "the outside as a dimension of diversity and chaos,"¹²³ a dimension that bears no moral value.¹²⁴ These buildings turn inward away from the possibility that the exterior space that they create is a locus of meaningful human activity. This meaningful activity is reserved only for those people who have access to the interior, an access that often is available only to the privileged few. The outside space around the large shopping mall, the downtown sports arena,¹²⁵ and the high-rise slabs of the massive urban public housing project exemplify this ultimately dysfunctional, pathologically charged space.¹²⁶

Viewing these various modes of space along a spectrum facilitates understanding of the significance of community. Each point along the spectrum represents an ideology of function. It stands for a distinct way in which the individual might take part in social life and a way that can be intimately participatory, transactional, or hierarchical. Moreover,

122. RICHARD SENNETT, *THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES* 19 (1990).

123. *Id.*

124. "What we make in the urban realm are therefore bland, neutralizing spaces, spaces which remove the threat of social contact: street walls faced in sheets of plate glass, highways that cut off poor neighborhoods from the rest of the city, dormitory housing developments." *Id.* at xii.

125. "Who are they bringing the city back for? Not us," said Ted French, an Indianapolis job setter. "I pay a tax on restaurant food and beverages in the city to help finance the Hoosier Dome, but I've never been in it." Levathes, *supra* note 8, at 241.

126. For a compelling analysis of how the physical design of these projects causes them to be dysfunctional, see OSCAR NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1973).

the particular values that the individual holds are strongly determined by this way of taking part in social life and political society. Shall the individual be a mere consumer of values that others determine and impose, doubtlessly in the service of their own interests? Or, shall a person participate creatively in the determination of the values that one ultimately internalizes?

Clearly, the built environment is intimately involved in the processes of politics of the highest order. When a particular built environment is the locus of a vibrant urban community, its destruction is a matter of political moment. The members will lose the value that the community gives to them in terms of material and psychic support, and they will also face the threat that their particular values, which evolved through the community, will now erode. Society at large will see that a loss as well because a mechanism through which some of its members achieved self-definition will no longer exist. Finally, an ideology of function will have been lost — a communitarian ideology that is alternative to and necessarily subversive of the ideology of hierarchy.

IV. INDIVIDUALITY AND COMMUNITY

The analysis to this point contains three assertions. First, the values that an individual holds are bound up with the built environment in a complex way. The meaning that the individual ascribes to the environment is a function of that individual's values. These values, being socially determined, are a function of the mode, hierarchical or communal, by which the individual takes part in social life and in political society, and the built environment serves as a vehicle for the social determination of those values. Second, hierarchically imposed redevelopment projects can destroy communal processes of meaning that simultaneously are a function of, and determine the shape of, the built environment. Finally, the destruction of these communal processes both impoverishes their participants materially and psychically and eliminates a practice of values that can be subversive of hierarchy.

Taken together, however, these assertions do not amount to a complete argument for the protection of community and communal processes from destruction. After all, individuality values are likewise subversive of hierarchy. Moreover, it is the values of individuality and not of communality that the Declaration of Independence and the Bill of Rights of the United States Constitution express so fully. Judicial doctrine ratifies the fundamental dichotomy of individual rights and state power that these documents express by declining to recognize, and consequently empower, the community. The implication that underlies doctrine is that community as a value is alien to, and thus subversive of, the privileged value of individualism.

More is needed before we have an answer to the "So what?" question, a justification for the judicial protection of communal values and the empowerment of communities. The purpose of the discussion which follows is to provide that justification. It will offer both direct and derivative arguments. The direct argument will justify communality as an independent locus of values that command judicial protection. The derivative argument will demonstrate that community provides values that not only are not subversive of the constitutionally privileged values of individuality but also are indeed necessary for the realization of such values.

The derivative argument begins with the familiar story of the evolution of political and economic society in the United States from the time of the late eighteenth century Revolutionary period. The Declaration of Independence captured the dominant Revolutionary rhetoric that embraced the cause of political liberty for the individual and resistance to the British political structure of hierarchy. The Constitution, in its 1791 form, embraced a dichotomy of strong individual rights and the limited, structured power of the federal state.

The social milieu at this period for most people was the small scale rural or town community.¹²⁷ This communal milieu, however, was not necessarily characterized by egalitarian reciprocity. From the beginning, the United States people subscribed to two different sets of cultural values — the Puritanism of the North and the Cavalier individualism of the South. Within these value systems, the social pattern of hierarchical community evolved in the North and the social pattern of the hierarchical plantation system evolved in the South.¹²⁸ For as long as the frontier remained open, the West provided a haven for those who sought an individualist way of life.¹²⁹

In the South, the oligopolistic plantation system dominated economic life. Manufacturing, which increasingly dominated economic life in the North, began in conditions of atomized competition. By the end of the nineteenth century, however, Northern productive enterprise had come to dominate the national economy. Moreover, it had substantially concentrated into large vertically and horizontally integrated capitalistic

127. ANNE NORTON, *ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE* 21, 99-105 (1986).

128. See *id.* at 19-199. In the South, the large plantation was, of course, a strongly hierarchical structure. In the larger society, there was also a strict hierarchy of large planter, middling planter, subsistence farmer, and slave. For a trenchant description of this hierarchy in Virginia, see EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

129. NORTON, *supra* note 127, at 203-18.

organizations¹³⁰ in which a mass national market of standardized consumer goods began to emerge.¹³¹

The wrenching disorder that accompanied this evolution of productive enterprise generated a political reaction that led to a radical structuring of American life.¹³² Public regulatory bodies began to emerge in order to mitigate the effects of this disorder and to involve government in the wielding of the considerable economic power now concentrated in the hands of the new economic elite.¹³³ With the concurrent organization of workers into large, integrated labor unions, economic society by the New Deal period had evolved into a structure of countervailing power, big business, big government, and big labor.¹³⁴ Simultaneously, an increasingly educated and increasingly professionalized middle class emerged to enter into a tacit bargain within this structure. In return for an ordered and hierarchical economic society, the new professional class obtained a favored, though not exalted, position as the cadre of experts whose task was implementing this new political and economic order on behalf of the rest of the populace but at the direction and behest of the economic elite.¹³⁵

Today, what might accurately be termed state capitalism has become institutionalized as the representatives of productive enterprise have in-

130. *E.g.*, MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901*, 253-89, 375-403 (1962); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967). *See generally* MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988); ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* (1982).

131. *E.g.*, MICHAEL STROPER & RICHARD WALKER, *THE CAPITALIST IMPERATIVE: TERRITORY, TECHNOLOGY, AND INDUSTRIAL GROWTH* 88, 206-07 (1989).

132. For a general account of this period, one which argues that the Progressive Movement achieved the mitigation of the disorder that accompanied enterprise concentration through the hierarchical restructuring of economic and political life, see WIEBE, *supra* note 130.

133. *See* SKLAR, *supra* note 130; WIEBE, *supra* note 130 (providing general accounts of the emergence of the involvement of government in productive enterprise).

134. A general description of this evolution into a structure of large clusters of economic and political power is presented in JOHN K. GALBRAITH, *AMERICAN CAPITALISM: THE PROBLEM OF COUNTERVAILING POWER* (rev. ed. 1956); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* (1958). Thorough descriptions of the resulting enterprise structure are presented in JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (2d rev. ed. 1971); CHARLES N. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

135. For an argument that the Progressive Era amounted to the working out of this tacit bargain, see WIEBE, *supra* note 130. For a detailed description of the process of emergence of this hierarchical order, particularly the role of the professional class at the level of the small city, see JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* 47-83 (1980); SALLY M. GRIFFITH, *HOME TOWN NEWS: WILLIAM ALLEN WHITE AND THE EMPORIA GAZETTE* (1989).

creasingly captured the legislative and administrative organs of government.¹³⁶ Economic and public life are now organized into large scale, bureaucratic, hierarchical entities. The economic experience of most people takes place at the more powerless levels of productive and administrative bureaucracies and as atomized consumers in mass markets for goods and entertainment. Similarly, most people experience little political power, having only the opportunity to vote in elections for candidates who will, once in office, almost invariably respond only to interest groups.

With a majority of the population now located in suburban areas,¹³⁷ most people find themselves in a physical milieu that makes difficult the formation of intimate communities that are broadly inclusive across all the various gamuts of age, economic status, ethnicity, and religious and political persuasion. Instead, our social experience tends to take place fragmented among narrow clusters within these various gamuts. Those who do live a more general communal experience, one that is inclusive at least across a physical locality, are for the most part, members of the occasional, well-knit, typically ethnically homogeneous, often economically modest urban neighborhood or the members of socially peripheral religious groups such as the Amish and the Mennonites.¹³⁸

In political life, because of the endemic interest group capture of most levels of legislative and executive government, most people experience a substantial degree of powerlessness, reduced to voting in periodic elections for candidates who will be largely unresponsive to them once in office. This same experience of powerlessness takes place in their role as consumers in the mass, standardized markets for goods and services. In their role of producers in economic life, their experience tends to take place at the lower, more powerless levels of a hierarchical bureaucracy. Most people, then, tend to experience substantial elements of atomized subordination in a life that tends toward fragmentation rather than integration among its social, political, and economic aspects. Cultural experience has evolved a considerable distance from the Founding

136. The fact and mechanisms of legislative and administrative capture are discussed in BARTLETT, *supra* note 48; JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); NISKANEN, *supra* note 51; *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* (Roger G. Noll & Bruce M. Owen eds., 1983); Julius Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357 (Julius Q. Wilson ed., 1980); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-95 (1988).

137. John R. Stilgoe, *The Suburbs*, AM. HERITAGE, Feb. - Mar. 1984, at 20, 21.

138. The particular communal characteristics of the Old Order Amish are incisively discussed in MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* 102-25 (1982).

era with its intimate, integrated physical milieu and the heady experience of the first flush of success in incorporating the ideal of the liberty-endowed strong individual into political culture.

As we have seen, the shape of legal doctrine strongly mirrors cultural experience, conceptualizing the polity in terms of a dichotomy of the individual and the state, giving little recognition to the community as a discrete bearer of rights and responsibilities.¹³⁹ Moreover, in practice the law ratifies the exercise of economic and political power through a strongly hierarchical structure,¹⁴⁰ accepting the increasing synergy between the hierarchists of bureaucratic productive enterprise and the hierarchists of bureaucratic government. As a result, the law ratifies the subordinated, powerless status of the theoretically liberty-endowed, rights-bearing individual. *Berman v. Parker* and *Poletown Neighborhood Council v. City of Detroit* serve as telling examples of the extent to which economically and socially modest individuals find themselves to be largely at the mercy of a hierarchy of economic and political power.

Robin Paul Malloy decries the phenomenon of present-day American political culture as the antithesis of the classic liberal values that he champions. What this essay advances, however, is the argument that, antithetical as state capitalism might be to these values, it is, perhaps ironically, an inevitable development from classic liberal values. To understand and explore this argument, we can draw on cultural theory,¹⁴¹ an emerging conceptualization of the complex values that can arise in political and social culture, and the dynamics that political and social processes follow as these values evolve over time.

Standard political and social theory, like legal doctrine, tend to recognize only a dichotomous world of individualism and hierarchy.¹⁴² Cultural theory, by contrast, offers a more complex description of the world by focusing on the choices that the individual must make in order to function in an uncertain world. In particular, cultural theory seeks to describe the greater diversity of values that an individual might adopt and the ways of life to which different sets of values lead. It also offers to explain how these values, and their corresponding ways of life, arise and why they both persist and change.

139. Frug, *The City*, *supra* note 101.

140. Frug, *Ideology*, *supra* note 100.

141. The principal works on cultural theory on which the following discussion is based are MARY DOUGLAS, CULTURAL BIAS 34 (1978); Mary Douglas, *Introduction to Grid-Group Analysis*, in *ESSAYS IN THE SOCIOLOGY OF PERCEPTION* 1-8 (Mary Douglas ed. 1982) [hereinafter Douglas, *Introduction*]; MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY (1973) [hereinafter DOUGLAS, NATURAL SYMBOLS]; MICHAEL THOMPSON ET AL., CULTURAL THEORY (1990).

142. THOMPSON, *supra* note 141, at 3, 21.

Cultural theory starts from several interrelated ideas: (1) an individual's values do not arise *sua sponte*, but instead are the result of a process of interaction between individual and society; (2) these values determine how the individual understands the world; and (3) this understanding of the world determines the way of life that an individual leads.¹⁴³ A way of life is a viable combination of cultural bias; a particular pattern of shared values, beliefs, and social relations; and a particular pattern of relating with others, which reciprocally react in a mutually reinforcing way.¹⁴⁴ Thus, a way of life is the acting out of a way of thought.¹⁴⁵

We are, however, ultimately uncertain about the true nature of the world.¹⁴⁶ Is nature, for instance, benign, an almost unlimited source of plenty to be exploited by skills developed through trial and error? Or is it tolerant of exploitation, but only up to a point, so that only those with uncommon expertise should manage resource exploitation? Or, yet again, is nature fragile, so that exploitation of it must occur only within extremely narrow bounds in order to avoid ecological calamity? Or, even further, is nature wholly capricious, with life nothing more than a lottery?¹⁴⁷

It is clear that a set of values, and a corresponding viable way of life, can proceed from any of these four assumptions about nature.¹⁴⁸ Further, it is not possible to disprove any one of them, nor does any one of them fully capture the nature of the physical world.¹⁴⁹ If, then, we are ultimately uncertain about the nature of the world, we are also uncertain about how we should exist in it. In this state of uncertainty, we must choose among a variety of cultural biases from which we can determine a pattern of social relations.

Because of the incompleteness of each available cultural bias, any one, if adopted, will act as "the normally invisible screen through which culture" allows the individual to perceive the choices that life presents.¹⁵⁰

143. *Id.* at 21-23.

144. *Id.* at 1.

145. Douglas, *Introduction*, *supra* note 141, at 5.

146. *See id.* at 10, 26.

147. *Id.* at 26-29. The same may be said of human nature. Are people invariably self-seeking and thus not malleable? Or are they completely unpredictable? Yet again, are they born sinful, though they are redeemable by good institutions? Or are they born good, but corruptible by evil institutions? *Id.* at 33-36.

148. *Id.* at 1-18.

149. *Id.* at 83-100.

150. Douglas, *Introduction*, *supra* note 141, at 7. *See* THOMPSON, *supra* note 141, at 22.

A set of values is a way of seeing, and "a way of seeing is always a way of not seeing."¹⁵¹

Anything whatsoever that is perceived at all must pass by perceptual controls. In the sifting process something is admitted, something rejected and something supplemented to make the event cognizable. The process is largely cultural. A cultural bias puts moral problems under a particular light. Once shaped, the individual choices come catalogued according to the structuring of consciousness, which is far from being a private affair.¹⁵²

What are the available choices of ways of life? Cultural theory generates a set of alternatives through a matrix that measures two facets, or dimensions, of the individual's relationship with the social context.¹⁵³ These dimensions carry the labels "grid" and "group." Grid is a measure of the degree to which an individual sees her life as circumscribed by externally imposed prescriptions. Group is a measure of the extent to which an individual finds herself incorporated into bounded units, a measure of the extent to which she owes group allegiance.¹⁵⁴

A matrix of these two facets of sociality describes a set of ways of life that are already familiar from this discussion. The low-grid, low-group *individualist* owes no allegiance to groups and is not bound by a strong network of prescriptions.¹⁵⁵ The high-grid, high-group *hierarchist* seeks out the bounded group with differentiated roles and a strong network of prescriptions which are generated both within the group and from outside.¹⁵⁶ The low-grid, high-group *egalitarian* owes allegiance to a sharply bounded group, one which, however, does not define differentiated roles or a network of prescriptions.¹⁵⁷ Cultural theory denominates these as the three "engaged" ways of life.¹⁵⁸ It also defines a fourth way of life, the high-grid, low-group *fatalist*, who exists in a context of atomized subordination, strongly subject to a network of prescriptions but owing no group allegiance.¹⁵⁹

151. THOMPSON, *supra* note 141, at 24 n.7 (quoting KENNETH BURKE, PERMANENCE AND CHANGE 70 (1935)).

152. Douglas, *Introduction*, *supra* note 141, at 1.

153. THOMPSON, *supra* note 141, at 5-11; Douglas, *Introduction*, *supra* note 141, at 3-5.

154. THOMPSON, *supra* note 141, at 5, 11; Douglas, *Introduction*, *supra* note 141, at 3.

155. THOMPSON, *supra* note 141, at 7, 46-48.

156. *Id.* at 7, 44-46.

157. *Id.* at 6, 44.

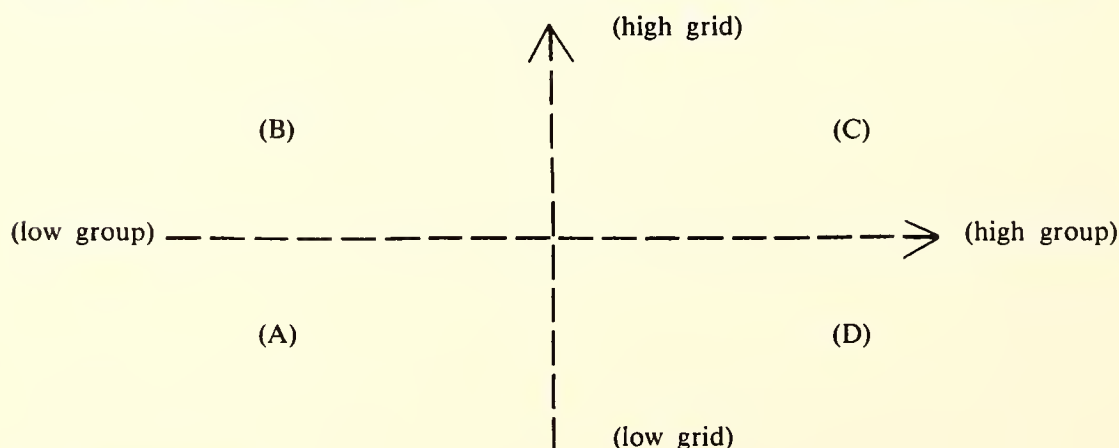
158. *Id.* at 88.

159. *Id.* at 6, 43, 93-96. There is a fifth way of life, that of the *hermit*, which

Each of us must have a set of beliefs about the world, a cosmology, in order to function. Cultural theory describes the principal alternative cosmologies available for choice. Although the social world tends to appear to the individual as a given, it is individuals who construct ways of life in interaction with their social milieu. Thus, cultural theory is not a theory of determinism.¹⁶⁰ It does posit that the choices of ways of life are limited. It holds the individual responsible, however, for making the choice. Cultural theory presents an explanation of the social construction of individual values:¹⁶¹ "society is a human product," a product of the cosmologies that individuals have constructed. "Man is a social product," the product of the cosmology that the individual adopts, whether by choice or by default.¹⁶²

Because each of these ways of life, or cosmologies, is incomplete in the sense that it does not fully capture the world, it is an ideology — "a way of seeing is always a way of not seeing."¹⁶³ Because of this incompleteness, each cosmology is incapable of anticipating and responding effectively to some situations.¹⁶⁴ Individualists are innovative in exploiting resources, but tend not to react to ecological limits. Hier-

will not be discussed further in the analysis which follows. The hermit's way of life is "one in which the individual withdraws from coercive or manipulative social involvement altogether." *Id.* at 7. A graphical representation might be helpful in understanding how grid and group generate these ways of life, or cosmologies, and how they interrelate:



A = Individualist

B = Fatalist

C = Hierarchist

D = Egalitarian

For similar diagrams, see *id.* at 8; Douglas, *Introduction*, *supra* note 141, at 4.

160. Douglas, *Introduction*, *supra* note 141, at 7.

161. THOMPSON, *supra* note 141, at 55-66.

162. *Id.* at 23 n.4 (quoting PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 61 (1967)).

163. *Id.* at 24 n.7 (quoting KENNETH BURKE, *PERMANENCE AND CHANGE* 70 (1935)).

164. *Id.* at 93.

archists are skillful at anticipating ecological limits, but are not innovative in devising ways of pushing these limits back. Egalitarians live effectively within a given level of technology, but tend not to capture the opportunities that technological innovation offers.

Because of this incompleteness, a society in which all of its members hold the same cosmology could not generate social institutions capable of maintaining societal viability in the long term. A society composed entirely of individualists would tend toward lawless violence.¹⁶⁵ A society composed entirely of hierarchists would tend toward despotism and stagnation.¹⁶⁶ A society composed entirely of egalitarians would tend to have no institutions capable of generating societal cohesion and would be subject to incessant fissuring and reforming of small subgroups.¹⁶⁷ Thus, each of the active cosmologies requires the others in order to make up deficiencies, to define itself against, or to exploit.¹⁶⁸ The fatalists, of course, are the most ready target of exploitation.¹⁶⁹

Cultural theory does not simply provide a matrix for understanding society synchronically and structurally. More importantly, it provides a way of understanding society diachronically as well, particularly the evolution of patterns of cosmologies over time. Cultural theory predicts that a society, in order to maintain its viability as it encounters changing exogenous circumstances over time, must maintain the opportunity for the three active cosmologies to emerge and will experience the combination and recombination of tacit alliances between particular active cosmologies.¹⁷⁰

165. *Id.* at 87.

166. *Id.* at 88. "Hierarchy once instilled develops self-reinforcing moral arguments that enable more unequal steps in status to be tolerated." Douglas *Introduction*, *supra* note 141, at 6.

167. THOMPSON, *supra* note 141, at 87-88. The endemic problem of the egalitarian community is fissure because without grid to supply a basis for internal cohesion, the community enjoys cohesion only as long as there is a homogeneity of particular values and tastes among its members. When these become heterogeneous, as they will tend to do over time, the community faces two choices. Either the cosmology of its members must move up-grid toward a more accepting attitude toward hierarchy, or if they are to maintain their cosmology, they must fracture into homogeneous subgroups, which then engage in intergroup line drawing as the only way available for the necessary task of defining group identity. For discussion of the fissure alternative, see THOMPSON, *supra* note 141, at 19-20; DOUGLAS, *NATURAL SYMBOLS*, *supra* note 141. For an example of the alternative of fissure, see Dennis E. Owen, *Spectral Evidence: The Witchcraft Cosmology of Salem Village in 1692*, in *ESSAYS IN THE SOCIOLOGY OF PERCEPTION*, *supra* note 141, at 275. For an example of the alternative of moving up-grid, see ALBERT HUNTER, *SYMBOLIC COMMUNITIES: THE PERSISTENCE AND CHANGE OF CHICAGO'S LOCAL COMMUNITIES* 178-97 (1974).

168. THOMPSON, *supra* note 141, at 83-97.

169. *Id.* at 93-96.

170. *Id.* at 83-100.

The particular cultural evolution of the United States is altogether consistent with cultural theory. The constitutional framework adopted the cosmology of individualism in the Bill of Rights and the cosmology of hierarchy in the state-federal political structure that underlies the unamended text of the Constitution. The period from the late eighteenth century, when American culture was largely divided between individualists and hierarchists, to the middle years of this century, saw a long process of evolution among the cosmologies that cultural theory describes. When, as was inevitable during this two century period, only some individualists were economically successful, competition forced the relatively large number of the unsuccessful out of the individualist cosmology. Their movement was "up-grid" toward fatalism because their discomfort with high-group values made the high-group cosmologies of hierarchy and egalitarianism even less satisfactory alternatives than fatalism. As some of the successful individualists, because of their success, moved toward hierarchy as a highly effective vehicle to institutionalize their success, economic and political power settled into a tacit coalition of the hierarchists and the successful individualists,¹⁷¹ leaving the displaced individualists in a condition of subordinated and powerless fatalism subject to the exploitation of the individualists and hierarchists.¹⁷²

The counterculture of the 1960s appears to have developed as an escape from the powerlessness and alienation of fatalism, the selfishness of individualism, and the suffocating structure of hierarchy to the empowering solidarity of the egalitarian community. The recent "communal turn" in the larger society¹⁷³ is quite likely the consequence of the spread of these egalitarian ideas outward from the counterculture to tempt the large numbers of fatalists who, still imbued with the individualist ideals of political rhetoric, now sense that a move down-grid toward a realized, successful individualist way of life is no longer possible.¹⁷⁴ The problem,

171. This is the "stable diagonal." David Ostrander, *One- and Two-Dimensional Models of the Distribution of Beliefs*, in *ESSAYS IN THE SOCIOLOGY OF PERCEPTION*, *supra* note 141, at 14, 26-27. Alternatively, in more general parlance, it is "the establishment." THOMPSON, *supra* note 141, at 88.

172. For a penetrating study of the unfolding of this process in a particular geographical locality, see GAVENTA, *supra* note 135.

173. There is emerging a vast literature on this phenomenon. The most prominent early study is ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

174. The associated phenomenon is the erosion of the middle class, which is the subject of another emerging vast body of literature. For a prominent and detailed description of the phenomenon, see KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990). See also ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* 196-224 (1991).

however, is that it is difficult to realize the egalitarian way of life because the law is so dismissive of the egalitarian community as a collective action form capable of bearing rights and responsibilities.

This is, again, consistent with cultural theory. Egalitarianism need not pose a threat to the individualist cosmology.¹⁷⁵ As long as the structure of Bill of Rights protections remains intact, those who successfully live the individualist way of life will enjoy economic reward and wield power almost regardless of the mix of a culture's cosmologies. Moreover, the core function of the egalitarian community is the drawing of a sharp boundary between who is in and who is out.¹⁷⁶ The purpose of collective action for the egalitarian community, however, is not necessarily to exploit those on the outside. Rather, it seeks to demarcate between those who are to enjoy the mutual benefits that take place within the group and those who are not, to protect its members from the power of those on the outside, and to seek its fair share of the benefits that accrue from the collective action of the larger society that takes place through the general political system.

In addition, individualism is not a threat to hierarchy. The individualist way of life requires the presence of hierarchy to provide a system of protection for rights to property and claims arising out of bargain.¹⁷⁷ Without a structure for regulating interpersonal relations that only a high-grid cosmology will seek to establish, a predominately individualist culture would continually risk anarchy and disintegration.

Egalitarianism is, however, a threat to hierarchy. If a large number of fatalists were to embrace the egalitarian cosmology, the hierarchists would quite simply have fewer fatalists available for exploitation. Moreover, the hierarchists would now have to share economic and political power with the newly emerged egalitarian communities made up of the former fatalists. In addition, with the share of power of the hierarchists now attenuated, there would be an opportunity for some of the remaining fatalists to move down-grid to become successful individualists, further decreasing the number of fatalists available for exploitation and further shifting power away from the hierarchists.

For these reasons, it would strongly serve the interests of the hierarchists for the rhetoric of political discourse to embrace as exclusively as possible the principles of individualism, particularly those that cluster around the concept of classic liberalism. It would also strongly serve their interests for the law to place practical barriers in the way of

175. See THOMPSON, *supra* note 141, at 90.

176. See generally DOUGLAS, *NATURAL SYMBOLS*, *supra* note 141.

177. THOMPSON, *supra* note 141, at 87.

achieving egalitarian communities capable of exercising power on the political and economic hustings. It is certain that the hierarchists have the means to take steps toward serving these particular interests by shaping the substance of public discourse and by shaping the substance of legal doctrine.¹⁷⁸ It is also certain that hierarchists speak strongly in public discourse in the language of individualism,¹⁷⁹ thereby helping to create a normative context within society that discourages communalism. It surely is no accident that there is, as well, a legal context that discourages communalism.

Cultural theory thus explains what has in practice happened in the United States — that a society that values individualism highly nevertheless can readily evolve into one with a substantial element of hierarchy as well. When this happens, moreover, there is likely to emerge a tacit power coalition of individualists and hierarchists, leaving the mass of society to a position of atomized, alienated subordination and systematic exploitation. The result is a society that in concept values individual liberty highly while in practice is made up largely of powerless individuals. This contradiction is intolerable if the commitment to the values of individualism is to remain intact.

It is typical to think of communitarianism as being the antithesis of individualism. Cultural theory reveals, however, that egalitarian communalism can act as a leaven within society in a way that derivatively serves individualist values. The potential that this leavening power offers provides the judiciary with the justification for facilitating, rather than preventing, the emergence of egalitarian communities.

The derivative argument for egalitarianism, that egalitarianism serves the constitutionally privileged cosmology of individualism, also suggests a direct argument which is based on how a community functions. The homogeneous values that a cohesive community generates provide a powerful matrix in which the individual member can engage in self-definition. The solidarity of the community acts as a shield to protect the individual member from the power of those on the outside. This solidarity simultaneously allows the community to act as a collective action group in the economic and political markets, thereby enabling

178. Perhaps this explains why corporations (hierarchists) argue so vigorously for being treated as natural persons, especially for purposes of exercising First Amendment rights of expression. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

179. A prominent recent example is the controversial advertising by the cigarette manufacturer Philip Morris on the theme of the two hundredth anniversary of the Bill of Rights. E.g., Kim Foltz, "Lemon Awards" Given for Ads Deemed Sour, N.Y. TIMES, Dec. 11, 1990, at D21; Bruce Horovitz, *Cigarette Ad Ploys Spark More Protests*, L.A. TIMES, June 25, 1991, at D1; Tony Mauro, *Philip Morris TV Ads Assailed*, USA TODAY, Nov. 27, 1989, at 4A.

the individual member to enjoy a positive measure of power through the community. Thus, the egalitarian community provides to the individual consigned to the atomized subordination of fatalism an alternative cosmology which offers in abundance what the fatalist lacks, self-definition, empowerment, and protection from the individualists and hierarchists who tend to comprise the economic and political power elite.¹⁸⁰

The constitutional structure gives privileged status to the individualist cosmology through the Bill of Rights, with particular emphasis on the principles of a pluralism of values and freedom of association. To the extent that the law discourages the empowerment of the egalitarian community, it perhaps paradoxically, undercuts these principles by making it difficult for the powerless individual from acting out the consequences of the communal turn that is becoming an increasingly palpable phenomenon in current society. This frustration prevents the fatalist from exercising an associational choice, one which is capable of generating distinctive, powerful, and empowering values.

The motto of the United States, *e pluribus unum*, provides a way of encapsulating the arguments from cultural theory. The implicit goal, the cohesive general society of the *unum*, cannot exist if a large proportion of the body politic is made up of alienated, powerless individuals. They can become a participating, empowered part of the *unum* only if there is, on the plane of reality, a functioning *pluribus* that includes a sufficiently rich diversity of the active cosmologies.

V. THE CITY AND THE RENEWAL OF DOCTRINE

Two steps remain. One is to return the focus of the argument to the context of the city. The other is to suggest, within the context of the redevelopment of urban land, what contours judicial doctrine might

180. The argument of this essay is not that the social and political ills of the United States will magically vanish if only the current communal turn will cause egalitarianism to emerge as the dominant cosmology of our culture. Cultural theory tells us that a culture dominated by the egalitarian cosmology can simultaneously tend toward instability and hierarchy, just as a culture dominated by the individualist cosmology can simultaneously tend toward hierarchy and fatalism. Moreover, the literature confirms that in practice, the small community can exhibit its dark side, tending toward hierarchy and oppression and generating an appalling vacuity and venality of values. For factual depictions, see GAVENTA, *supra* note 135, at 47-83 (Middlesboro, Kentucky); GRIFFITH, *supra* note 135 (Emporia, Kansas); HUNTER, *supra* note 167, at 178-97 (Chicago). See generally THORSTEIN VEBLEN, *ABSENTEE OWNERSHIP: THE CASE OF AMERICA* 142-65 (1967). "The country town of the great American farming region is the perfect flower of self-help and cupidity standardised on the American plan." *Id.* at 142. For fictional depictions, see SHERWOOD ANDERSON, *WINEBURG, OHIO* (1919); HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); H. SINCLAIR LEWIS, *MAIN STREET* (1920); EDGAR LEE MASTERS, *SPOON RIVER ANTHOLOGY* (1915).

take to incorporate the principles that comprise the high-group communal cosmology. Because of the extended nature of the discussion to this point, this further discussion will provide only a general sketch.

A. *The Meaning of the City*

We have explored how we, as humans, ascribe meaning to the built environment — buildings and spaces that, because of this meaning, become intimately bound up with human action, containing it, shaping it, and becoming shaped in return. The title of this essay, however, is "The Meaning of the City." This points to an entity that is different in scale and complexity from the built environment itself. The city is in part a large, complex built environment capable of bearing complex meaning. It is also in part a locus of people and the complex functions that they carry out within that locus.

The meaning of the city in United States culture has always, it seems, derived from a mixture of avoidance and fascination. The ancient legal principle, "city air makes men free," reveals a path from the servitude of the rural manor to freedom.¹⁸¹ It also reflects, however, the pestilential nature of the medieval city. From ancient times as well, the freedom that the city bestowed on those who came often enough degenerated for many of them into the status of a proletariat or worse.

Avoidance was manifest early in our colonial history. The colonial era Virginia legislature repeatedly enacted legislation requiring its counties to establish ports and towns before they began to emerge.¹⁸² The Virginian Thomas Jefferson is noted for his faith in a social system based on husbandry, a faith that had its roots in his fear of the cities that would inevitably develop from a manufacturing economy: "The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body."¹⁸³ Historically, however, the city has also been the glittering mecca for our restless and creative youth eager to escape the stultifying dullness of the rural and small town life that dominated the American experience until well into this century.

181. See Frug, *The City*, *supra* note 101, at 1084.

182. Act V, June 1680 Sess., 2 WILLIAM W. HENING, STATUTES AT LARGE 471 (1823); Act VIII, April 1691 Sess., 3 WILLIAM W. HENING, STATUTES AT LARGE 53 (1823); Act XLII, Oct. 1705 Sess., 3 WILLIAM W. HENING, STATUTES AT LARGE 404 (1823). For an analysis of the nature of the resistance to towns and to the circumstances that led to their eventual emergence, see MORGAN, *supra* note 128, at 283-88; DARRETT B. RUTMAN & ANITA H. RUTMAN, A PLACE IN TIME: MIDDLESEX COUNTY, VIRGINIA, 1650-1750, 204-33 (1984).

183. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden ed., 1955). See generally Alfred Kazin, *Fear of the City: 1783 to 1983*, AM. HERITAGE, Feb. Mar. 1983, at 14.

The historical pattern of the urban population reveals much about this complex cultural attitude. From the late 1700s to the end of the nineteenth century; there were two large patterns of migration. One was westward toward the frontier, fueled both by the population of the eastern United States and by immigration.¹⁸⁴ The other migration was to the eastern cities which transformed, as a consequence of the Industrial Revolution, from small centers of trade and small scale manufacturing to industrial centers.¹⁸⁵ These cities drew originally from their rural hinterlands and then from immigration.¹⁸⁶

The twentieth century has seen a continuation of, and an increased complexity in, the pattern of urban change that began with the Industrial Revolution. Once the frontier closed, a further migration from the rural areas began and extended well into the post-World War II period as the cities became centers of finance and corporate control.¹⁸⁷ Concurrently, a migration began from the urban center to the periphery, first by the affluent elite and then by the descendants of those who came to the city in the nineteenth century.¹⁸⁸ For the latter, the city has turned out to have been little more than a way station, a place from which to escape, the immigrants having developed no intergenerational commitment to a milieu of tenements and slums.¹⁸⁹ Taking their places in the city were the African Americans who began their migration from the rural south in the 1930s¹⁹⁰ and the later Latino and Asian immigration, both legal and illegal, that continues today.

A typical pattern characterizes the present day United States city. The core has decayed as retail trade and manufacturing follow the earlier

184. Lewis Mumford, *The Fourth Migration*, in *PLANNING THE FOURTH MIGRATION: THE NEGLECTED VISION OF THE REGIONAL PLANNING ASSOCIATION OF AMERICA* 55, 57-58 (Carl Sussman ed., 1976). Writing in 1925, Mumford described four migrations — to the frontier, from rural areas and from abroad to the new centers of manufacturing, from rural areas and small cities to the new centers of finance and corporate control, and at that time incipient, from the urban core to the suburbs. *Id.* at 55-64.

185. MARK GIROUARD, *CITIES & PEOPLE: A SOCIAL AND ARCHITECTURAL HISTORY* 301-18 (1985); JEAN GOTTMANN, *MEGALOPOLIS: THE URBANIZED NORTHEASTERN SEABOARD OF THE UNITED STATES* 186-98 (1961); Mumford, *supra* note 184, at 58-59.

186. *E.g.*, TAMARA K. HAREVEN & RANDOLPH LAGENBACH, *AMOSKEAG: LIFE AND WORK IN AN AMERICAN FACTORY-CITY* 13-22 (1978).

187. GIROUARD, *supra* note 185, at 318-24; GOTTMANN, *supra* note 185, at 199-210; Mumford, *supra* note 184, at 59-61.

188. HENRY C. BINFORD, *THE FIRST SUBURBS: RESIDENTIAL COMMUNITIES ON THE BOSTON PERIPHERY, 1815-1860* (1985); GOTTMANN, *supra* note 185, at 210-13; KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); JOHN R. STILGOE, *BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939* (1989).

189. For a description of the New York and Chicago tenement areas, see GIROUARD, *supra* note 185, at 311-13, 316-19.

190. NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

residential outmigration of the middle class. The immigration from other countries continues. It is accompanied, however, by the newer phenomenon of gentrification, as the more affluent professional classes abandon the suburbs and restore once upscale core residential areas that had fallen into decay during the period of massive suburbanization. Often enough, the city attempts to restore its decayed core with a "monumental" redevelopment project — the sports arenas of Indianapolis and the Renaissance Center office towers of Detroit are examples. In some cases, accompanying these redevelopment projects has been the transformation of the core economy to the post-twentieth century form of heavy industry, information processing.¹⁹¹ It is on the periphery of the typical metropolitan area, however, where the information processing seems to prefer to locate. Here grow the "edge cities," office complexes clustering around shopping malls, breaking the sprawling pattern of low-density, residential development and strip commercial development that has characterized the first wave of suburbanization.¹⁹²

It is clear that there really has never been a time when the cities have not been a scene of dynamism not only in terms of both physical and spatial configuration but also in terms of population pattern. In the abstract, dynamism is a positive value, in contrast with its opposite, stagnation. What is not clear, however, is whether in practice this dynamism amounts to anything more than an incessant churning that dampens the core urban function of innovation and creativity rather than being a symptom of healthy urban function.

The redevelopment of Southwest Washington and of Poletown seems to amount to little more than churning. In neither case is there any evidence that the lot of those who were displaced by the projects did anything but deteriorate. In neither case is there any evidence that the general public saw a net fiscal benefit from these projects. In neither case is there any evidence that the destruction of the current uses led to new uses that were aesthetically or technologically innovative. In the Poletown case, for example, there is nothing technologically innovative about just another assembly plant for a domestic automotive industry

191. A prominent example is Pittsburgh, which has generated an information processing economy in the aftermath of the collapse of the steel industry from which it originally grew. For a description, see Peter Miller, *Pittsburgh: Stronger Than Steel*, NAT'L GEOGRAPHIC, Dec. 1991, at 125. For a more general description of this process, see JOHN H. MOLLENKOPF, *THE CONTESTED CITY* (1983). For the proposition that information processing is the industry with the greatest future level of economic reward, see REICH, *supra* note 174, at 81-97.

192. The "edge city" phenomenon is described in JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991).

that is eroding precisely because it is no longer innovative.¹⁹³ In short, there is nothing to suggest that either project did anything other than subordinate the urban fabric to the interests of the non-innovative economic elite for their substantial economic benefit.

The ambivalence toward the city that is embedded in our cultural myth has seemed to mask the extraordinary importance of the city from the general consciousness. Even in the United States, the ancient function of the city as the crucible of cultural definition remains intact. Moreover, we are beginning to understand that the national economy may be little more than an artificial construct made up of the successful economies of particular metropolitan areas.¹⁹⁴ In addition, it is a well-known fact that most of us live in metropolitan areas, yet it simultaneously seems to be a little-understood fact. With our cultural consciousness continually fixed on the rural countryside, we deny psychically the physical reality that the city is our home.

The core process of the city is synergy.¹⁹⁵ The city successfully carries out its cultural and economic functions by attracting and facilitating the interaction among individuals with a diversity of talents, ambitions, and values. This interaction generates innovation, which is a measure of the success of the city's economic and cultural functions.

As we have seen, however, values arise either communally or hierarchically. If the city's functions are organized hierarchically, they will tend to generate their own almost invariably homogeneous values. By their nature, hierarchically-organized functions tend to discourage innovation.¹⁹⁶ Moreover, the power of these economic and cultural hierarchies will erode the heterogeneous values that diverse individuals bring to the city, replacing them with the homogeneous values that these hierarchies generate. If, by contrast, the city's economic and cultural functions allow free play to individualist and egalitarian cosmologies, then the diversity of particular egalitarian communities that will inevitably emerge will generate a diversity of values. The competitive drive of the individualists will, in this rich milieu of heterogeneous values, generate innovation.

193. BROCK YATES, *THE DECLINE AND FALL OF THE AMERICAN AUTOMOBILE INDUSTRY* (1983).

194. JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* (1984) [hereinafter JACOBS, *CITIES*]; STROPER & WALKER, *supra* note 131.

195. JACOBS, *CITIES*, *supra* note 194, at 29-44; JANE JACOBS, *THE ECONOMY OF CITIES* 49-202 (1970); JACOBS, *DEATH*, *supra* note 121, at 143-238; MUMFORD, *supra* note 114, at 568-76.

196. BURTON H. KLEIN, *DYNAMIC ECONOMICS* 140-212 (1977); ROBERT B. REICH, *THE NEXT AMERICAN FRONTIER* 117-39 (1983). See generally MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982).

The built environment of the city, its physical reality, is a crucial ingredient in the city process. Structurally, it is a strong determinant of physical liveability, and consequently of the power of the city to attract a diversity of individuals to it. The built environment can also function as a powerful vehicle for determining the values which, in turn, determine its meaning. Thus, the built environment and the way in which it arises, are symptoms of the dominant cosmology of the city. It is the dominant cosmology of the city that will determine whether, in the long run, it will be able to maintain its viability in performing its basic functions as a crucible of economic and cultural innovation.

B. Renewing Judicial Doctrine

This Article argues that judicial doctrine, when confronting disputes over the development of urban land, should account for communality. In the context of this argument, "accounting for communality" means that the courts ought to support the viability of the low-grid, high-group community that, in cultural theory, embodies the cosmology of egalitarianism. In particular, courts ought, by the way that they resolve these disputes, both protect these groups from exploitation by those who now wield economic and political power and enable these groups to come into being, to maintain their form, and to function as an empowered collective action group in the markets for economic and political action. It also means that courts ought to account for the meaning that people ascribe to urban land through the values that they derive from a communal existence.

To argue that judicial doctrine should account for communality in this way is, of course, to argue for a substantial shift in the contours of judicial doctrine. It is in applying to particular disputes what is desirable in concept, of course, that the complexities of a doctrinal shift become evident. A brief consideration of three relevant doctrinal areas — eminent domain, the regulatory taking, and the right of association — will illustrate these complexities.

In the law of eminent domain, the fact that the land to be taken contains a community would be relevant to two basic questions. The first is the question whether the land should be taken. Under the traditional law of eminent domain, as long as the land was to be put to a direct public use, the two principal issues were the amount of land to be taken, and the amount of the compensation that the expropriated landowner was entitled to receive.¹⁹⁷

197. See DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 590-626 (2d ed. 1986).

Berman v. Parker extended the reach of the eminent domain power by ratifying the taking of land for uses that serve the public interest even though these are directly private uses.¹⁹⁸ This had the effect of increasing the complexity of the question whether the land could be taken by introducing the issue of the public interest. To incorporate the consideration of communality would further increase the complexity of this inquiry because the public interest issue would now cut two ways.

“Incorporating the consideration of communality” requires the adoption of two presumptions. The first presumption would be that the community members themselves benefit from the fact of community. Because they make up part of “the public,” the loss of community occasioned by the taking would cut against that taking being in the public interest. The second presumption would be that the community serves the interests of the rest of the public as well because democratic political society is better off having in its midst individuals who, by reason of their community membership, have a stronger stake in society and enjoy empowerment in the political realm. The loss to the rest of the public that the taking would occasion would also count against that taking being in the public interest.¹⁹⁹

The immediate effect of *Berman v. Parker* was to expand in concept the reach of the eminent domain power beyond takings for direct public uses to include takings for ultimately private uses that serve the public interest.²⁰⁰ Moreover, the Court extended the practical reach of the eminent domain power even further by the extreme deference it showed to the legislative determination of whether the taking served the public interest, a deference that was tantamount to a “no scrutiny” test. Further, the public interest inquiry, by implication, focused only on the effects of the new use for which the land was expropriated.

198. See *supra* notes 24-34 and accompanying text.

199. See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112-13 (1981) (property that is essential to its owner's competence to participate in social and political life ought to be immune from public expropriation); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 978-79 (1982) (property that is essential to its owner's self-definition ought to enjoy more stringent legal protection).

200. Duncan Kennedy notes that the distinction in the law between the public sphere and the private sphere has become illusory, suggesting that it is a distinction that cannot be made. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction* 130 U. PA. L. REV. 1349 (1982). In concept, however, in a polity founded on individual rights, it would seem that this distinction should be made. In practice, of course, that the barrier has collapsed is in large part a symptom of the capture of the organs of public power by the economic elite, making it possible for the equating of their actions and their interests with the public interest. When this happens, then nothing is private, including, as we have seen, the supposedly private property of the powerless.

Incorporating a consideration of communality, however, tends to diminish this broad reach of the eminent domain power. It broadens the focus of the public question to include the effects of the loss of the use that the expropriation will destroy. In addition, eminent domain takings would no longer involve a simple dichotomous clash of individual rights and state power. Because they would now also involve a distinct claimant of rights, a community, it would be more difficult for a court credibly to exercise extreme deference to the determinations of the legislature.²⁰¹

Assuming, however, that a court finds that, on balance, the taking would be in the public interest, the second basic eminent domain question involves the compensation the displaced community members should receive. Incorporating the consideration of communality into the compensation issue would require an accounting of the value that the community brought to the expropriated owners. This value would, of course, be an amount in addition to fair market value. These various determinations involve such further complex issues as how to determine whether a community exists and how to measure the value that a community brings to the public and to its members.²⁰²

To account for communality in eminent domain doctrine involves the limitations on the power of government to participate in urban redevelopment. A separate matter is the power of government to limit or shape the right of landowners to engage in the private redevelopment of their urban land. This involves the already difficult area of the regulatory taking. The dispute that arose over the development of the air rights over Grand Central Terminal in New York City in the *Penn Central*²⁰³ case provides a paradigm example of the issues of communality and meaning that are the focus of this essay. In *Penn Central*, an organ of city government, the Landmarks Preservation Commission, had expressed the importance that the public had come to ascribe to the architectural value of the Terminal by giving official landmark status to it. When the Commission later refused to allow the owner to develop the air rights over the Terminal in a way that would disrupt that value, the owner challenged the denial of development permission as an uncompensated, and thus an unconstitutional, regulatory taking.

The Supreme Court took the standard approach to the dispute by conceptualizing the owner's interest in the Terminal as the right of

201. For example, the presumption of efficiency in the market for political action is undermined in a milieu of almost blatant producer capture of the legislative process.

202. For an exploration of how these issues can be determined, see SCHOENBERG & ROSENBAUM, *supra* note 121.

203. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

dominion over it,²⁰⁴ by casting the dispute in terms of a dichotomous clash of individual rights and state power,²⁰⁵ and by applying the ends-means test to reach a resolution.²⁰⁶ In holding that there was no taking, the Court gave little attention to the difficult matter of meaning bound up in the question of whether the end of the regulation was legitimate. Instead, it gave considerable attention to the matter of the loss of the owner's economic value bound up in the question of whether the means were reasonable.²⁰⁷ The Court held that this erosion of value was not excessive and that the regulation as applied was constitutionally permissible.²⁰⁸

As with eminent domain, accounting for communality would generate considerable complexity in regulatory taking doctrine. It would, for example, substantially broaden the purposes for which government may restrict the use of land. *Penn Central* involved regulation imposed to prevent a private owner from destroying the values that the public had ascribed to its property in its current form. If values generated by the common action of the general public are deserving of protection, then the processes by which these values arise are deserving of protection.

Indeed, this is the most fundamental function of accounting for communality — facilitating a fully participatory process by which the built environment takes on meaning. Thus, government would also have authority over the form that a private owner's property might take. Government, that is, would have the legitimate power to prevent a landowner from engaging in the kind of development that produces dysfunctional buildings and spaces, and built environments that are disruptive of the participatory meaning-creation process, thereby precluding the creation of meaning by the public who uses those buildings and spaces.

This complexity goes beyond the matter of the reach of government power over private property. It goes to the basic conceptualization of property itself. By taking the standard approach, the *Penn Central* Court simply deferred to the legislative and administrative determinations that led to the recognition of the architectural value of the Terminal. Under

204. See *id.* at 122 (assuming that a historic landmark can be of itself fully private property).

205. *Id.* at 123-24.

206. *Id.* at 128-29.

207. *Id.* at 135-36.

208. *Id.* at 136-38. The opinion thus simply replicates the line drawing "too far" test of the fountainhead regulatory taking case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This approach was incapable of development into a coherent theory precisely because it proceeded from a dichotomous conceptualization of these disputes in terms of individual rights and state power which are incommensurate.

this approach, the Court gave its principal attention to the property right as a limitation on governmental action. If the taking doctrine were instead to account for communality, then a court would have to confront directly both the ascription of meaning that arises from communal action and the viability of the processes by which this arises, because the power of that communal action would now function as a limitation on the property right.

When William Blackstone described the right to property as "that sole and despotic dominion which one man claims and exercises over the external things of the world,"²⁰⁹ he captured the thrust of the liberal project to liberate the individual from a status of being tied to the land to a status of autonomy and power through the right to hold dominion over land. In the liberal conception, the individual enjoys rights *to* property.

Accounting for communality requires a blurring of this dominion-based conceptualization of rights to land toward a participation-based conceptualization of rights *in* land. It cannot, of course, simply undo the liberal project by replicating the hierarchical order of the medieval manor by which the rights that the individual held in the land of the manor determined that person's status. If communality is to advance the liberal project, a participatory conceptualization of rights in land must be non-hierarchical and reciprocal. The rights that an individual holds in a particular piece of property, however, would necessarily be subject to the webs of meaning that the public ascribes to the environment of which that property is a part.²¹⁰

Such a reconceptualization of the property right surely would involve a radical shift in taking doctrine. What is interesting, however, is that it may not involve a shift to a *more radical* doctrine. After all, current judicial doctrine, in disputes involving the clash of enterprise with property, allows the often uncompensated expropriation of rights in land if this will serve the economic interests of productive enterprise.²¹¹ This

209. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

210. In *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), the Wisconsin Supreme Court held, more by implication than expressly, that the public held an interest in certain biotic functions (those that occur in freshwater wetlands and lands adjacent to natural lakes and streams) of the land, an interest that is paramount to any ownership that an individual might hold in land on which those biotic functions occur. The New York Court of Appeals, in the decision that was the subject of the petition for certiorari to the United States Supreme Court in *Penn Central*, tried to capture this notion and apply it to urban social functions by treating the value of the Terminal as arising from public supply and consumer demand as much as from private producer supply. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1275-76 (1977), *aff'd*, 438 U.S. 104 (1978).

211. Denis J. Brion, *Rhetoric and the Law of Enterprise*, 42 SYRACUSE L. REV. 117, 119-42 (1991).

doctrine, because it shifts away from a structure of antecedent and determinate rights to a structure of rights based on the current measure of economic utility, is already radical in terms of the values of protected individualism that the Bill of Rights establishes. Indeed, it arguably would be far less radical for property rights to be contingent instead on the play of the broadest range of societal values generated through a fully participatory process than a system of rights contingent on the play of values generated hierarchically in the far narrower interests of the economic elite.

Perhaps the most sensitive area of doctrine involves the right of association. The First Amendment to the United States Constitution establishes a broad freedom of association that conflicts with the principle of equal protection of the Fourteenth Amendment. The product of this conflict is a body of law that strongly limits the exercise of the associational freedom in ways that exclude on such bases as race, gender, and age.²¹²

The core function of the community, however, is line drawing — to draw and maintain as sharp a boundary as possible between who is included and who is not. Thus, to incorporate into the law strong protection for the egalitarian cosmology creates a paradox. We cannot undercut hierarchy without at the same time undercutting the hard-won principle of equal protection. Nor can we resolve the paradox by appealing to underlying principles. Equal protection is oriented more strongly to the process-based value of *ex ante* justice. Communitarity is oriented more strongly to the substance-based value of *ex post* justice.

The paradox arises in part, however, precisely because economic and political action, and derivatively, social action, have for such a considerable period, followed a hierarchical mode. For a racial majority to exclude a racial minority renders the minority powerless. For an elite economic minority to exclude the majority renders the majority powerless. In hierarchical circumstances, the matter of values is necessarily a matter of hegemony. Recent debates over values — the counterculture of the 1960s, the feminist movement, the movement for freedom of sexual orientation, the movement for the right to reproductive privacy — have been particularly bitter. They have been so bitter because they are carried out in a political milieu of doing things hierarchically. In such a milieu, it is entirely expectable that the contending sides implicitly assume that only a zero-sum outcome is possible from any particular conflict of values; either your values “win” or mine “win.”

What is possible, at least in concept, is a positive-sum mode that achieves the accommodation of different values in a non-hegemonic way.

212. E.g., Fair Housing Act, 42 U.S.C. § 3601 (1988); CAL. CIV. CODE § 51 (West 1982 & Supp. 1991).

The outcome of any particular value conflict would be one by which no particular set of values becomes dominant. Achieving a true pluralism of values is indeed one strong and strongly possible function of the low-grid cosmology of egalitarianism as contrasted with the high-grid cosmology of hierarchy.

In hierarchical circumstances, practice of one's values is always at risk if they are not hegemonic values. Thus, one is reduced to intolerance of other values precisely because of their potential to gain hegemony. If, however, there is only a pluralism of values, then one no longer runs a risk by becoming more tolerant of the practice of different values because communities that cluster on particular patterns of value will not threaten her. The argument for a relaxation of the equal protection principle in order to protect and encourage the egalitarian cosmology consequently derives from the validity, in fully pluralistic circumstances, of the aphorism, "Good fences make good neighbors." Moreover, though particular communities would now have the power to erode one's right to nondiscrimination, this empowering of communities can derivatively empower one to escape falling into the status of powerless fatalism by opening up the opportunity for one to achieve power and fulfillment by successfully following the individualist cosmology or by joining one's own boundary-maintaining community and achieving power and definition through it.

What this discussion has tried to show is that accounting for communality would involve a considerable shift in the way that courts conceptualize disputes over the redevelopment of urban land. The standard approach posits a dichotomy which conceptualizes these disputes in terms of individual rights and state power. Accounting for communality amounts to accounting for the three engaged cosmologies that cultural theory describes by conceptualizing these disputes in terms of a far more complex trichotomy of individuality, hierarchy, and communality.²¹³ Furthermore, it offers a purpose for this more complex conceptualization — to reduce the ranks of those who hold the default, disengaged cosmology of powerless fatalism.

VI. CONCLUSIONS

Robin Paul Malloy's *Planning for Serfdom* raises urgent questions about the way that we redevelop our cities. Casting his arguments in terms of legal economic discourse, he offers an analysis that is compelling

213. For an exploration and development of the trichotomous conception of individuality, sociality, and communality as normatively valuable modes of existence thereby worthy of the protection of the law, see Ronald Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

because its premises, grounded in the ideology of classical liberalism, resonate so strongly with the dominant theme of our political rhetoric. This Article proceeds from the assumption, congenial with Malloy's premises, that the thrust of legal doctrine should protect and advance the values of individualism embodied in our founding documents because they constitute a salient episode in the still unfolding liberal project.

This Article has focused, however, on how it is that our culture, across its political, social, and economic facets, has developed strongly hierarchical characteristics despite an enduring dominance of the rhetoric of individualism in our political discourse. To cast the argument in terms of Malloy's legal economic discourse, this essay has probed the concept of demand, a fundamental element of market theory, which itself is a fundamental element of Malloy's classical liberalism. What this essay has tried to argue is that the substantive content of demand is exogenous to the market, and that demand is not something that "just naturally happens."

In classical liberal theory, a well-functioning market takes demand as a given and proceeds to achieve efficiency through the market-clearing actions of suppliers. What this market model does not seem to recognize, however, is that demand, because it proceeds from the values that market consumers hold, is manipulable to the extent that these values are manipulable. These values are manipulable when they arise through hierarchical societal structures. Moreover, the market creates a hierarchy of wealth distribution because it differentially rewards the various activities that derive from the various talents that individuals possess. This hierarchy of wealth distribution creates the power for some to manipulate the values of others, introducing enough circularity and artificiality into the market function to undercut its usefulness as an open, competitive, and neutral process.

Cultural theory provides a model of human interaction that opens the crucial impact of the way in which we redevelop our cities to analysis. What the built environment means, and how that meaning arises, determines whether the city is capable of carrying out its functions of economic and cultural innovation successfully. It is clear that hierarchical public-private redevelopment projects are the symptom of a substantial breakdown in the fundamental economic and cultural functions of the city.

We do in concept have open political and economic systems. In that sense, we are getting the cities that we deserve. If we want better cities, we must learn to love the city. That we do not love the city is manifest in our flight to the suburbs and hinterlands and in our failure to resist the predominance in the urban built environment of dysfunctional architecture that rejects public urban space as a potential locus of moral value. The city can no longer be an object of fear to be left to those who will manipulate it to their own ends. Instead, we must welcome it

as a centering place in which we actively seek to participate in its ongoing creation and development.

E.M. Forster's story, *The Machine Stops*, describes the collapse of a dysfunctional futuristic world in which the built environment made it possible for, and encouraged, people to be cut off from face-to-face contact with their fellow humans.²¹⁴ In our culture, we are tending to build cities that are marvelously effective mechanisms for reducing face-to-face contact to the most impersonal transactional level. There is little doubt that there are thoroughly plausible explanations for the evolution of this state of affairs, rooted in the reasons why those of us who make up our dominant culture, and their ancestors, came to this continent.

Whatever the cause, the result is the massive reduction of most of us to a condition of atomized, alienated powerlessness, a result that is hardly what the long struggle of the liberal project has sought to achieve. We must learn to develop our cities as mechanisms for bringing us together communally so that, perhaps paradoxically, we can become more fulfilled and empowered as individuals. We should, that is, reach for the *unum* through a properly understood emphasis on the *pluribus*.

214. E.M. Forster, *The Machine Stops*, in *THE ETERNAL MOMENT AND OTHER STORIES* 3 (1928).

Urban Development and Human Development

PAUL H. BRIETZKE*

Along with economically disadvantaged rural areas, the ghettos or slums of our cities form an entrenched Third World of the United States.¹ Levels of ghetto unemployment and underemployment, substandard and nonexistent housing, malnutrition, health care, and education approximate those found in many Third World countries, where drug addiction and crime rates are usually less severe. Ghetto government often feels like a Third World authoritarianism: the police and other officials can act in random and bizarre ways because they are not accountable to their charges, and residents have little reason to vote for a candidate who is handpicked in what is usually a one party rule locally. Ghetto residents can thus reasonably expect a "subsistence urbanization"² that is akin to the means that Third World peasants use to win the bare necessities of a life that is nasty, brutish, and short.

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1. Michael Harrington argues that our affluent nation at "the same time . . . contains an underdeveloped nation," where the "mechanism of the misery" is similar to those in African and Asian countries. Public housing projects are often "income ghettos" and the "modern poor farms where social disintegration is institutionalized." MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 138 (Penguin Books 1968) (1963). Heibroner and Singer add that:

Visitors to America from underdeveloped lands marvel at first at the cars and TV antennas in the slums and cannot believe that slumdweller are not rich. Soon, however, they learn that the *feeling* of poverty is not determined by what a family possesses so much as by what *other* families possess.

. . . .

. . . Poverty is a social condition, not just an economic fact.

ROBERT L. HEIBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA* 233, 236 (1977).

2. GERALD BREESE, *URBANIZATION IN NEWLY DEVELOPING COUNTRIES* 5 (1966). See HARRINGTON, *supra* note 1, at 10, 24 (describing "the economic underworld of American life," where to be poor is to be "an internal alien"); LAWRENCE E. HARRISON, *UNDERDEVELOPMENT IS A STATE OF MIND: THE LATIN AMERICAN CASE* 30 (1985) (the kisses and blows given capriciously to children form the model for the individual's relation to the state); DAVID HARVEY, *SOCIAL JUSTICE AND THE CITY* 79 (1973) (the "slum is the catch-all for the losers, and in the competitive struggle for the cities' goods the slum areas are also the losers in terms of schools, jobs," and services); PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 8 (1989) (homelessness is the aggravated state of a more prevalent but less visible extreme poverty, where the hold on the basic amenities taken for granted by most Americans is precarious); CHARLES SACKREY, *THE POLITICAL ECONOMY OF URBAN POVERTY* 45 (1973) (The subjugation and segregation of dual markets creates "an urban peasantry destined to live off welfare payments and white paternalism.").

In the United States and in most other places, the causes of such a Hobbesian life are social rather than natural, no matter how many economists swear that poverty and powerlessness merely indicate a lack of success, or even of effort, in "free" or "natural" markets. The central problem is, rather, the slumdweller's lack of access to lucrative markets due to the existence of socially created barriers to entry into these markets. The United States has thus been left with greater ghetto underdevelopment than is found in the other advanced capitalist nations.³ Like that observed in the Third World, this developmental "dualism" locks America's poor into low (and sometimes no or illicit) wages and productivity. Here and elsewhere, the poor are unable to postpone their consumption and save capital and thus, they are usually left with property rights only in their own, often unskilled, labor-power. Although they have few if any "competitive advantages"⁴ to bring to bear in their few exchanges, the poor are seen by mainstream economists as participants in "informal" markets.

Like many Third World urbanites, American slumdweller's are *in* but not *of* the city; theirs is a segregated and thus a smaller universe of contact and experience. Any economic growth that occurs cannot lead to development, so long as the kinds of institutions conducive to growth remain underdeveloped. The "trickle down" solutions offered by the federal government are closely paralleled by the policies that a Reaganite World Bank and International Monetary Fund impose on some Third World governments. Even if America's local government officials are sympathetic to the poor's plight, they must deal with a growing, Third World-style dependence. Local resources must be allocated in socially and politically suboptimal ways to attract badly needed corporate resources from outside of the community. Local resources that might otherwise be directed toward solving the problems of the poor are thus dissipated through increasingly fierce competition for the highly mobile capital of the global economy.⁵ The United Nations' Conference on

3. HARVEY, *supra* note 2; HEILBRONER & SINGER, *supra* note 1, at 239. See *infra* notes 62-84 and accompanying text.

4. See MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 10 (1990) (a firm's competitive advantage either lowers costs or promotes differentiated products that command premium prices).

5. See SEVERYN T. BRUYN, *A FUTURE FOR THE AMERICAN ECONOMY: THE SOCIAL MARKET* 343, 346, 360-61 (1991) ("Global capital disenfranchises local communities because powerful corporations buy and sell local property, both land and firms, in competition for the greatest return on invested capital." The U.S. is thus "becoming a colony of foreign investors."); PORTER, *supra* note 4, at 15-16 (developing nations are frequently trapped because they have no strategy for moving beyond their fleeting competitive advantages); Pierre Clavel & Nancy Kleniewski, *Space for Progressive Local Policy:*

Human Settlements concludes that the unacceptable circumstances of urban life largely result from an inequitable economic growth, which is incapable of satisfying basic needs⁶ and which cannot be repaired through the piecemeal approach of market economies.⁷

Robin Malloy's excellent book, *Planning for Serfdom*,⁸ points out another similarity between American and Third World cities: "development" policies that amount to planning for a serfdom, at least for the poor and powerless. Like the pyramid-building pharaohs of ancient Egypt, urban politicians and planners appear to suffer from an Edifice Complex. They seem unable to distinguish the essential from the merely desirable — a distinction which is seldom drawn in marketplace transactions or analyses. Succumbing to developers' blandishments and facing an inevitable and growing gap between municipal resources and the demands placed on them, the temptation is to ignore unmet needs and to spend scarce resources on prestigious buildings. The gleaming surfaces of these buildings impress the outside world, reflect attention away from ghetto scenes, and enhance the "lifestyle" of the upper middle class through a gentrification that attracts this group's political support. This Edifice Complex is most likely to be indulged when the poor have no effective means to express complaints and when mutual suspicion already exists between the poor and the city leaders.⁹ Former Indianapolis Mayor Hudnut may thus not be so very different from a Kwame Nkrumah or Bung Sukarno, or so a Hoosierdome filled with Baltimore Colts might suggest.¹⁰

Examples from the United States and the United Kingdom, in BEYOND THE CITY LIMITS: URBAN POLICY AND ECONOMIC RESTRUCTURING IN COMPARATIVE PERSPECTIVE 199, 228 (John R. Logan & Todd Swanstrom eds., 1990) [hereinafter BEYOND THE CITY LIMITS]; James Coleman, *The Resurrection of Political Economy, in* THE POLITICAL ECONOMY OF DEVELOPMENT 30, 33 (Norman T. Uphoff & Warren F. Ilchman eds., 1972); Rita J. Bamberger & David W. Parham, *Leveraging Amenity Infrastructure: Indianapolis's Economic Development Strategy*, 43 URB. LAND, Nov. 1984, at 12. See also *infra* notes 26-27 and text accompanying.

6. United Nations Conference on Human Settlements, *Declaration of Principles, in* THIRD WORLD URBANIZATION 342, 342-43 (Janet Abu-Lughod & Richard Hay, Jr. eds., 1977) [hereinafter *Declaration of Principles*].

7. *Id.*

8. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM]. Malloy's title suggests his fondness for the ideas expressed in Friedrich A. Hayek, *Road to Serfdom* (1944), which treats many similar themes in similar ways.

9. BREESE, *supra* note 2, at 96-97. See MALLOY, SERFDOM, *supra* note 8, at 10 (discussing how the "visible monuments of political power" come together with an "invisible restructuring of cultural values and norms," in an Indianapolis which is no longer "Indiana-place"). In America's heralded "urban renaissance," the visibility of a project is almost synonymous with its viability. *Id.* at 9.

10. See MALLOY, SERFDOM, *supra* note 8, at 110. Indianapolis subsidized the Colts

Perhaps without realizing it, Malloy is also speaking about some formerly progressive Third World countries when he concludes that:

American society has become so driven by a myopic quest for the visible results of its materialistic designs that it fails to see how the end product . . . may promote an ideological framework that . . . [undercuts] the values and norms of natural and inalienable rights, human dignity, and the individual autonomy once held dearly.¹¹

Like Malloy, the United Nations' Conference pleads for "the human scale" among all of the skyscrapers, for political participation, and for other needs of disadvantaged groups.¹² These factors are seldom considered in marketplace transactions or analyses. The development of things rather than of people frequently turns the poor and powerless into its victims, if for no other reason than that the eviction of the

for the political (presumably as opposed to the economic) purpose of providing a basis for local identification, for supporting the "home team's political agenda" by stimulating an almost collegiate pride in municipal athletics. *Id.* The subsidies that prompted the Colts' exit from Baltimore (where a different and perhaps more interesting urban development policy is being implemented) came in large part from nonprofit (foundation) sources. Subsidies include revenue guarantees, a low-interest loan, and public aid for a training camp. See Bamberger & Parham, *supra* note 5, at 15. Having built the Hoosierdome (a name that offends some Hoosiers from my end of the state) at vast public expense, the city presumably believed that it had to *do* something with it. Unless my economic analyses are disqualified by virtue of my being a Bears fan — a vice that calls economic (or any other) rationality into question — the City was trying to take advantage of the monopoly or economic rents that stem from the fact that the number of NFL franchises is tightly limited. It is difficult to imagine the Colts earning money for any other reason or to calculate the net outcome from city leaders and team owners trying to exploit each other. Yet, it seems plausible that, like those in many Third World countries, the Indianapolis poor are left with less bread and mediocre circuses. See HARVEY, *supra* note 2, at 115; W. Arthur Lewis, *On Assessing a Development Plan*, in *LEADING ISSUES IN ECONOMIC DEVELOPMENT* 716, 721 (Gerald M. Meier ed. 2d ed. 1970) ("In every country . . . politicians believe that the greatness of their country is demonstrated by one or another kind of large useless expenditure"; for example, by doing on a "lavish . . . scale what could be done much more cheaply."). See also Joseph T. Hallinan, *Blacks Sharing Little of Midtown Development Wealth*, *INDIANAPOLIS STAR*, May 29, 1988, at A1 (a redevelopment agreement promised blacks a significant role in revitalization, but blacks have not participated to a great extent). To be fair, we should note Indianapolis's media-praised "can-do spirit." MALLOY, *SERFDOM*, *supra* note 8, at 10. Also, as in Houston, the Indianapolis city limits encompass areas that are in the suburbs of other cities. *Id.*

11. MALLOY, *SERFDOM*, *supra* note 8, at 140. Humanistic Third World values would presumably be more social democratic and less classically liberal democratic, than Malloy's enumerated values, however. See *infra* notes 160-65 and accompanying text.

12. *Declaration of Principles*, *supra* note 6, at 344. See MALLOY, *SERFDOM*, *supra* note 8, at 4 (urban life and development are more than the efficient accumulation of capital goods).

poor to make room for one edifice after another eventually leaves them with nowhere to go.

I. GHETTOS AND ECONOMISTS

We would presumably learn much from Third World efforts to force a peoples' *right* to development onto an agenda set by the governments and corporations that are otherwise indifferent toward or hostile to this concern. Exposure to the Third World realities of our often invisible slums might shake American complacency and strengthen our resolve to try more creative solutions.¹³ The search for solutions is an important task because, as Malloy notes, "it is the urban environment with its dense population, its diversified and specialized enterprises, its ability to generate excess capital, and its influence on surrounding regions that first reveals the emergence, stagnation, or death of a great society."¹⁴ As "monuments to the possibilities of civilized cooperation,"¹⁵ many of our cities are now falling behind those in other advanced capitalist countries in terms of the value (the real income, the accessibility and the proximity) they offer to all but their most affluent residents. American cities remain the locus of power, but their ability to offer economic opportunities to unskilled rural migrants, to promote social change, and to offer the means of adjustment and social integration, seems truncated. Cities offer slumdweller "high rents, high density, low amenities" instead.¹⁶

A. Recent Changes

Many mainstream economists, especially those active in the law and economics enterprise, are stumbling blocks to, rather than facilitators

13. See HARRINGTON, *supra* note 1, at 11-12; Ronald I. Meltzer, *International Human Rights and Development*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 208, 214 (Claude E. Welch & Ronald I. Meltzer eds., 1984); Paul H. Brietzke, *Consorting with the Chameleon, or Realizing the Right to Development*, 15 CAL. W. INT'L L.J. 560 (1985); Hector G. Espiell, *The Right of Development as a Human Right*, 16 TEX. INT'L L.J. 189, 189-91 (1981).

14. MALLOY, SERFDOM, *supra* note 8, at 2. See BREESE, *supra* note 2, at 143 ("There is no worse combination than urbanization without development, because to the lack of urban facilities is added the want of employment opportunities.").

15. Mark C. Berger & Glenn C. Blomquist, *Income, Opportunities, and the Quality of Life of Urban Residents*, in URBAN CHANGE AND POVERTY 67, 67-68 (Michael G.H. McGreary & Laurence E. Lynn, Jr., eds., 1988) ("synergistic interactions" in cities are largely responsible for our standard of living).

16. HEILBRONER & SINGER, *supra* note 1, at 154. See BREESE, *supra* note 2, at 40-41; HARRINGTON, *supra* note 1, at 138; HARVEY, *supra* note 2, at 68-70; John Walton, *The International Economy and Peripheral Urbanization*, in URBAN POLICY UNDER CAPITALISM 119, 120, 122-23 (Norman I. Fainstein & Susan S. Fainstein eds., 1982).

of, creative new solutions to urban problems. Robin Malloy adroitly details some of the reasons for their failings, but urban problems have admittedly been complicated by recent and rapid economic and political changes. Historically, cities offered the "economies of agglomeration,"¹⁷ achieved by the location of large factories near one another, and a union-sponsored prosperity for middle and lower-middle income groups. Yet, we are said to now be living in "postindustrial" cities, where a "restructuring" has been prompted by changes in transport, communications, and computer technologies. Fordist production, the extreme division of labor on assembly lines which requires fixed accumulations of resources,¹⁸ is giving way to the more profitable flexibility of multilocal corporations and economic activities. The result is a deconcentration and reorganization of capital, labor, and government and a rapid growth in the service sector of the economy and in suburbs as productivity (as well as residential) centers.¹⁹

These economic changes are global in effect; stateless money circles the globe in seconds, through stateless banks that seem immune to regulation. To date, these changes have served further to marginalize the Third World and the inner cities of the United States, although a few escapees like Singapore and Hong Kong play roles analogous to some of our suburbs and Sun Belt cities. A Third World and inner-city marginalization have also resulted from an international explosion in the service economy. Some of the causes of this explosion are an increased consumer affluence and sophistication, an increased demand for leisure that can be satisfied by having others perform personal service tasks, growth in the youthful and elderly segments of the population that demand more services, the privatization of many formerly public services, and technological changes that reduce the costs of delivering

17. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 252-54 (1985).

18. John R. Logan & Todd Swanstrom, *Urban Restructuring: A Critical View*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 1, 11.

19. See BRUYN, *supra* note 5, at 343; FISCHER, *supra* note 17, at 252-54; Logan & Swanstrom, *supra* note 18, at 3, 4; Harvey Molotch, *Urban Deals in Comparative Perspective*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 175, 179 [hereinafter Molotch, *Urban Deals*]; Kenneth J. Neubeck & Richard E. Ratcliff, *Urban Democracy and the Power of Corporate Capital: Struggles Over Downtown Growth and Neighborhood Stagnation in Hartford, Connecticut*, in *BUSINESS ELITES AND URBAN DEVELOPMENT* 299, 302 (Scott Cummings ed., 1988); Edmond Preteceille, *Political Paradoxes of Urban Restructuring: Globalization of the Economy and Localization of Politics?*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 27, 51; Paul Kantor, *The Dependent City: The Changing Political Economy of Urban Economic Development in the United States*, 22 *URB. AFF. Q.* 493, 506-07 (1987). See also Berger & Blomquist, *supra* note 15, at 72 (a significant correlation exists between a city's unemployment rate and its share of Fordist manufacturing employment).

services.²⁰ Mainstream economists have difficulty analyzing this shift to services because they are reluctant to abandon Adam Smith's assumption that wealth is created out of material resources. The "new" services (as opposed to slinging burgers at McDonald's, the low-wage kind of service occupation that slumdwellers are lucky to command) create wealth by applying information, knowledge, human resources, and culture to the transformation of social life. Only those cities with superb universities and a highly-educated labor force will serve as command and control centers for the diffuse service empires that are emerging.²¹

Sparked by the deterioration in Fordist production processes, the decentralization of economic activities into the suburbs results in redistribution of skills, wealth, and governmental revenues away from the cities. Many suburbs have serious entry-level job shortages. There is a long-term mismatch between these jobs and the would-be employees living in the inner city, due to residential and job segregation, the paucity of suburban job information, and the deterioration in public transport. Decentralization also has political consequences and none is more revealing than the recent use of "public entrepreneurship" to describe qualities that were formerly called political (or policy) leadership or, less flatteringly, machine politics. This change in nomenclature marks a resurgence in the influence that a 1920s-style business managerialism exerts on politics: the most pressing urban need is usually considered to be the establishment of a good "business climate" through the nominally supply-side policies that operate on the demand side by appealing to corporations in their capacity as consumers of public resources. Instead of winning re-election merely by licensing elaborate planning and redistribution schemes, municipal politicians feel an increased dependence; their bargaining and logrolling opportunities have been eroded by recent economic changes and changes in federal policies.²²

20. Interestingly, America leads Japan and Germany in the export of many services, although these countries have large domestic service sectors. Americans' distinct advantage of a fluency in English is one explanation.

21. BRUYN, *supra* note 5, at 332-34. Economists have difficulty measuring the price component of services, partly because many services are intricately linked to industrial production. *Id.* at 324. The service economy is a process based on mutual engagement, and social value is inherent in the activity itself. *Id.* See PORTER, *supra* note 4, at 240-45; Committee on National Urban Policy, National Resource Council, *Committee Report*, in URBAN CHANGE AND POVERTY, *supra* note 15, at 1, 5; Logan & Swanstrom, *supra* note 18, at 4, 7.

22. HARVEY, *supra* note 2, at 61, 86; Kantor, *supra* note 19, at 512; John D. Kasarda, *Jobs, Migration, and Emerging Urban Mismatches*, in URBAN CHANGE AND POVERTY, *supra* note 15, at 148, 193; Logan & Swanstrom, *supra* note 18, at 11; Molotch, *Urban Deals*, *supra* note 19, at 179. See MALLOY, SERFDOM, *supra* note 8, at 85 (politicians speak of public entrepreneurship rather than urban socialism or a state capitalism to

Urban politicians try to adjust to an era of "bidding down, bailing out, and building on the basics"²³ by striking a politically viable balance between the ideal of local popular control and the reality of pleasing economic elites. These elites, many of whom are nonresidents, evaluate politicians on the basis of marketplace criteria that are not relevant to the poor, who lack the price of admission to most markets. Robin Malloy describes the way this balance is struck in Indianapolis as follows: "The thought of government power and tax dollars being used to acquire a football team, a Saks Fifth Avenue department store, and luxury waterfront apartments seems to be contrary to the down home and traditional values of Indiana folklore."²⁴ This also seems contrary to the (traditional, at least) public purpose doctrine in constitutional law. Examples from other cities are given by Malloy and others, and these show a rather consistent pattern that is also seen in the Third World: the creation of independent development authorities to respond to capital markets and to circumvent a political accountability, the channelling of public involvement into such "nondevelopmental" concerns as job creation and housing rehabilitation, and the co-opting or isolating of people who oppose the implementation of the Edifice Complex.²⁵

forestall an examination of underlying premises that are inconsistent with individualism, capitalism, and other values we hold dear); Scott Cummings, *Private Enterprise and Public Policy: Business Hegemony in the Metropolis*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note 19, at 3 (government is perceived to be too large, expensive, and intrusive; therefore, private entrepreneurship becomes an urban planning device through the privatization of services and revenue sources); John J. Kirlin & Dale R. Marshall, *Urban Governance: The New Politics of Entrepreneurship*, in URBAN CHANGE AND POVERTY, *supra* note 15, at 348, 364 (recording "a shift from a tax-supported, grants-lubricated policy system toward a . . . system based on charges and fees").

23. Clavel & Kleniewski, *supra* note 5, at 200 (widely accepted "typology" of responses to recent economic changes: *inter alia*, local elites bail out of manufacturing and use "development" policies and financial institutions to shift capital into office construction and inner city gentrification). Explanations of urban restructuring are diverse, from passive adjustments to global processes to "willful action by local operators of growth machines," with a midpoint of everyone making the best of a bad bargain. Saskia Sassen, *Beyond the City Limits: A Commentary*, in BEYOND THE CITY LIMITS, *supra* note 5, at 237, 250.

24. MALLOY, SERFDOM, *supra* note 8, at 110-11. Compare *id.* at 10-11 (Indianapolis is engaged in "invisible restructuring of cultural values and norms," building on a "simplistic and egotistical conception of community" that is anchored in a "zero-sum game vision of the world.") with Bamberger & Parham, *supra* note 5, at 12, 16, 18 (charting developmental winners and losers is an interesting exercise, and Indianapolis pioneered a "new civics," in which "community involvement is as much a matter of enlightened self-interest as . . . of obligation," while using "leverage capital" from a local foundation to develop "a unique niche in a specialized economy — sports").

25. Kantor, *supra* note 19, at 512-13. But see Harvey Molotch, *Strategies and Constraints of Growth Elites*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note

Top city politicians are sometimes venal, but they are seldom stupid or malign. Spurred on by cutbacks in federal funding, politicians spend their time courting providers of capital, rather than pursuing other urban agendas.²⁶ The “[i]rrational and unrestrained competition” that ensued “has led some municipal jurisdictions to compromise seriously their revenue base with lucrative tax abatement incentives or to make rash commitments to finance infrastructure improvements or initiate land use changes through high-risk public indebtedness or fiscally questionable bonding programs.”²⁷ Like Third World countries, our cities are played off against each other by business people. Politicians are thus tempted into neomercantilist policies of dubious legality. As in the mercantilism of old, these policies represent a public-private “partnership” that is largely a private determination of the levels and types of public goods and services. These determinations ignore the needs of the poor and

19, at 25, 35 [hereinafter Molotch, *Strategies*] (Political entrepreneurs can mobilize both elites and public opinion through “grace and cunning, energy and wit, information and training.”). The constitutionality or legality of many of the tactics used is dubious, perhaps because the tactics are so new that definitive court tests are still forthcoming. See FISCHER, *supra* note 17, at 41 (Supreme Court will rarely interfere with local government decisions on zoning or land use); MALLOY, SERFDOM, *supra* note 8, at 13-14 (Tactics similar to those used in Indianapolis are used in Boston, St. Louis, Pittsburgh, and Louisville. In Louisville, the Louisville Riverfront Project was given a 30 acre site, \$13.5 million in financing, and \$11.5 million in federal funding, thereby creating a long-term business relationship); Cummings, *supra* note 22, at 16 (Houston displays a “developmental chaos,” as a “free market disaster area” incapable of financing social services.); Daniel Mandelker, *Public Entrepreneurship: A Legal Primer*, 15 REAL EST. L.J. 3 (1986) (discussing state laws that determine the legal acceptability of public entrepreneurial powers). But see M. Bruce Johnson, *Introduction*, in RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL AND THE PUBLIC INTEREST 1, 14 (M. Bruce Johnson ed., 1982) [hereinafter RESOLVING THE HOUSING CRISIS] (“Houston’s lack of land use controls is actually a more efficient system in protecting neighborhoods than the scandal-ridden, bribery-prone zoning boards found elsewhere. The market really is capable . . . if given the chance.”). Notwithstanding Hartford’s transformation into a corporate city at the forefront of high-tech services, it is the fourth poorest city in the nation, plagued by severe fiscal problems and an acute class polarization. Cummings, *supra* note 22, at 18. See Neubeck & Ratcliffe, *supra* note 19, at 299. See also Thomas J. Keii, *Disinvestment and Decline in Northeastern Pennsylvania: The Failure of Local Business Elite’s Growth Agenda*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note 19, at 269 (discussion of Wilkes-Barre, Pennsylvania).

26. Molotch, *Urban Deals*, *supra* note 19, at 176. See Preteceille, *supra* note 19, at 51-52 (given the need to compete for capital and the structure of local tax systems, the ability to redistribute resources to the poor is limited); Sassen, *supra* note 23, at 250 (City leaders have been “routed by financial capital, conservative states, and privatization ideologies.”).

27. Cummings, *supra* note 22, at 11. See BRUYN, *supra* note 5, at 360-61; Logan & Swannstrom, *supra* note 18, at 19-20; Kantor, *supra* note 19, at 510-11; Mandelker, *supra* note 25, at 3; Lowdon Wingo & Jennifer R. Wolch, *Urban Land Policy Under the New Conservatism*, 5 URB. L. & POL’Y 315, 326 (1982).

may prove to be impoverishing for the nonpoor as well. They also miss the significance of recent economic changes, by emphasizing the least mobile resource which is thus the one least attractive to investors implementing a flexible global strategy: urban land and the uses to which it is put.

Although the magnitude of recent economic changes strongly suggests the need for federal solutions that will enable cities to adjust to the "externalities" of these changes and to reduce wasteful competitions for capital, such solutions are unlikely so long as the federal government is widely perceived as too large, expensive, and intrusive. State governments are unlikely to help much either, because their responsibilities are swollen by a "new federalism" and their revenues are reduced under the local equivalents of Gramm-Rudman. The "old slums" had meaningful votes and could make their political influence felt, especially during the New Deal and its aftermath. At that time, perceptions of misery and the need for governmental solutions were more widespread, and governmental policies were made more openly.²⁸ Since then, "[t]he mobilization of interest groups, their representation . . . their incorporation into and effects on urban political processes," and even the groups' "theory base"²⁹ have all changed radically.

What effects have recent economic and political changes had in the ghettos? Rapid increases in catastrophic joblessness and homelessness, teen pregnancies, female-headed families, welfare dependence, serious crime, and the outmigration of middle and working class families that further concentrates poverty may have been some of the outcomes. Although many points of contact are likely to exist between these miseries and other recent economic and political changes, the chains of causation are long and not yet fully explored, least of all by mainstream economists.

28. See HARRINGTON, *supra* note 1, at 15; Kirlin & Marshall, *supra* note 22, at 352-53; Lewis, *supra* note 10, at 721; Robert H. Freilich, et. al., *The New Federalism — American Urban Policy in the 1980s: Trends and Directions in Urban, State and Local Government Law*, 15 URB. L. 159, 161 (1983). See also Cummings, *supra* note 22, at 9 (arguing that large Reagan-era budget deficits hurt both capitalists and the underclass, and that these deficits limit the ability of cities to manage and divert capital accumulation crises or to help local industries deal with similar crises); Kirlin & Marshall, *supra* note 22, at 349 (arguing that recent federal government expenditure policies are much less location-specific, involving the procurement of defense hardware, for example, rather than sewer grants); Kantor, *supra* note 19, at 495, 511 (arguing that the federal system of government creates special obstacles that exacerbate local-level tensions between political and marketplace accountabilities and that federal programs accommodate rather than limit economic warfare among cities). *But see* Committee on National Urban Policy, *supra* note 21, at 8-9 (stating that although local taxes have increased and city services and employees have declined, cities are generally healthier fiscally than they were early in the 1980s).

29. Kirlin & Marshall, *supra* note 22, at 357.

One can confidently conclude, however, that these economic and political changes overshadowed new ghetto miseries, making the amelioration of misery more difficult and less rewarding politically. Equity, representation, and the other social welfare issues concerning access to public goods and services are given lowly positions on the policy agenda of entrepreneurial politics. In any event, a San Diego or a downtown district will have more entrepreneurial opportunities than a Des Moines or a ghetto. African-Americans bore the brunt of deindustrialization (the deterioration in Fordist production processes) in the auto, rubber, steel, and other industries hurt most by the erosion of America's competitive position in manufacturing. These unemployed people lack the mobility to claim suburban jobs, and they lack the skills and education to enter the burgeoning new service occupations. Their schools and housing are deteriorating, and the slums may thus be expanding geographically.³⁰ Scott Cummings concludes that "[u]nrestrained free enterprise is reproducing the same patterns of urban blight that ravaged American cities during the 1960s,"³¹ while Moore and Squires believe that a "new social contract is emerging, one which calls for additional financial rewards for the wealthy but punitive sanctions for the poor."³²

B. *The Ideology of Analysis*

My necessarily brief description of recent economic and political changes is no doubt imperfect because little is reliably known about these changes. Mainstream economists seem to lack the information, the theoretical framework, and the incentives to acquire the facts and theories for analyzing these changes effectively and devising legal and political arrangements for ameliorating the attendant miseries of the poor and

30. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 135 (1987); Logan & Swanstrom, *supra* note 18, at 12. See Committee on National Urban Policy, *supra* note 21, at 11-12 (the most troublesome trend is the growing concentration of central city poverty, as the effects of deindustrialization are felt and as persons with marketable skills move away); Susan S. Fainstein, *Economics, Politics, and Development Policy: The Convergence of New York and London*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 119, 140 ("Using the tools of development corporations, tax subsidies, advertising and public relations, and financial packaging, officials [in London and New York] have stressed the economic development function of government to the detriment of social welfare and planning."); Neubeck & Ratcliff, *supra* note 19, at 301-02 (where deindustrialization has destroyed a union-led prosperity, the effects of trickle-down policies are at best uncertain and uneven).

31. Cummings, *supra* note 22, at 12.

32. Thomas S. Moore & Gregory D. Squires, *Public Policy and Private Benefit: The Case of Industrial Revenue Bonds*, in *BUSINESS ELITES & URBAN DEVELOPMENT*, *supra* note 19, at 97, 108.

powerless. In *Planning for Serfdom* and in *Law and Economics*,³³ Robin Malloy artfully describes how ideology will rush in to fill these vacuums of fact, theory, and empathy for the poor.³⁴ What Malloy calls legal economic "discourse"³⁵ among conservative (mainstream, Chicago School) economists is somewhat varied and sometimes passionate, but can be summarized briefly:

If we assume that everyone is economically rational and that their interactions are typified by exchanges in markets assumed to be nearly perfect, then these interactions will be efficient and serve to maximize society's wealth. It follows that statutory and regulatory interventions in these interactions can only be inefficient and serve to reduce society's wealth. The best law is thus the non-interventionist common law, which is seen to mimic efficient-by-definition market processes.³⁶

Although this theory may be contradicted by the recent economic and political changes I sketched, the analysis (from the "then" clause onwards) remains elegant, original, powerful, and internally consistent. Ideology is smuggled into the assumptions (the "If" clause) that must be made if the analysis is to operate properly.³⁷

33. ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990) [hereinafter MALLOY, *LAW AND ECONOMICS*].

34. See *id.* at 5, 10, 51, 52, 55, 64, 66, 156. See also Paul H. Brietzke, *Review: A Law and Economics Praxis*, 25 VAL. U. L. REV. 51 (1990) (reviewing Malloy's book).

35. MALLOY, *SERFDOM*, *supra* note 8, at 82. This discourse is "a battle of often unspoken and implicitly assumed first principles of faith." *Id.* at 84.

36. PAUL H. BRIETZKE, *THE LAW AND ECONOMICS OF THE CONSTITUTION* (forthcoming). This is a Kantian theory of knowledge, or Kelsen's *Grundnorm*, that distinguishes legal truth from falsity. *Id.* See Frank I. Michelman, *Microeconomic Appraisal of Constitutional Law* in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENT LAW* 137, 139 (Daniel Rubinfeld ed., 1979) ("[V]alue is perceived as strictly individual, private, and subjective, and law as strictly a device for removing or minimizing obstacles and elemental, frustrations."). The common law is "the organic carrier of popular morality," while "enacted law is taken to reflect specific dictates of sophisticated policy or particularistic formations of power." *Id.* at 140. See also *id.* at 158-59; *infra* note 145 and accompanying text.

37. See MALLOY, *SERFDOM*, *supra* note 8, at ix. Malloy's book is both a study of ideology in law and economics and a theory defending liberty, dignity, and freedom. Freedom is also an ideology, but one that we presumably accept. By way of contrast, the less influential "[c]ommunitarian (altruistic) and state-centered views of law and economics generally lead to conceptual frameworks of liberty that focus on the importance of groups, experts, and planners at the expense of the individual decision makers in the marketplace." *Id.* at 62. Economics theories differ in their ideological assumptions about the roles of the individual, the community, the state, and economic and political power. These roles form the basis for rival law and economic notions of property, contract, free choice, and justice. *Id.* at 62, 83. This ideological rivalry is fueled by the fact that

By no stretch of the imagination do the assumptions of mainstream law and economics offer relevant descriptions of life in the ghetto or in the corridors of power, in Indianapolis or elsewhere. Yet, these assumptions are widely admired and adopted. As I have written elsewhere: "It is not that Americans are stupid or unideological; it is that they have a high tolerance for dissimulation in pursuit of what they want"³⁸ and have the wealth and power to grab. Mainstream law and economics thus "works" for "us," even if we know that the economic rationality assumption cannot hold. It cannot hold because it ignores a host of factors that make us human, including altruism, habit, bigotry, panic, genius, luck or its absence, and factors such as peer pressures, institutions, and cultures that turn us into social animals. A dehumanized, desocialized, and often sexist "economic man" supposedly goes through life as if it were one long series of analogies to isolated transactions on the New York Stock Exchange.

Markets are the original sources of an economic and political pluralism, a diversification of risks and opportunities that could be made to create more viable niches for the poor and powerless. Paul Peterson's *City Limits*³⁹ builds this history into a conservative's brief for markets as dictators of urban policy and as legitimators of the economic growth demanded by elites.⁴⁰ In Peterson's extensively criticized view,⁴¹ implementing "welfare" concerns leads only to stagnation and decline.⁴² Yet, the markets he praises are not all there is to law or life, especially

Keynesianism (and its tendency to favor the poor and powerless) is no longer dominant, but there is no consensus on a replacement for the theory. Kirlin & Marshall, *supra* note 22, at 352. Severyn Bruyn rejects this notion of rivalry in favor of "a new synthesis . . . evolving in the private sector of the postindustrial economy . . . [It] is becoming socialized through its own internal dynamic, with different norms and values [that are] . . . not yet fully visible." BRUYN, *supra* note 5, at 331. Bruyn's many excellent analyses are undercut by the 1920s-style trade associational ideology he discerns in recent events. Such an ideology has historically demonstrable leanings toward cartels and even fascism.

38. Brietzke, *supra* note 34, at 57.

39. PAUL E. PETERSON, *CITY LIMITS* (1981).

40. Logan & Swannstrom, *supra* note 18, at 4 (citing PAUL E. PETERSON, *CITY LIMITS* (1981)).

41. *See id. passim*.

42. *Id.* at 4-5. A neoclassical micro model "assumes a two-commodity world, without history or politics, and occupied by two sexless people, without race or philosophy, one the owner of a business, the other a consumer." SACKREY, *supra* note 2, at 81. According to this view, the city "has no legitimate existence prior to or superior to the claims of the market." Moore & Squires, *supra* note 32, at 110. This view also ignores the political and cultural forces that shape markets. *But see* MALLOY, *SERFDOM*, *supra* note 8, at 3 (stating that market theory sets ideological and classically liberal boundaries to legal economic discourse through an emphasis on individual empowerment and counterbalancing power sources).

because the main marketplace criterion for policy evaluations, the willingness to pay, excludes persons whose evaluations may differ precisely because they are *too poor* to pay. The poor may have stronger objections to some of the ways in which market-generated "surpluses" are spent: conspicuous consumption by Yuppies, the Edifice Complex (a quasi-public conspicuous consumption), military hardware, and other conspicuous public consumptions. Elites may use their wealth and power to alter market conditions in their favor, to the point where Adam Smith's "invisible hand" becomes a thumb on the scales of production and distribution. The market metaphor cannot explain the indeterminacy that sometimes results from bargaining between social groups or communities with very different "utility functions" (wants and needs). Other bargains are all-too-determinate: the rich rarely surrender even marginal advantages at a price the poor can afford, while the poor frequently surrender important interests for a pittance.⁴³

Political "markets" may thus differ from economic markets simply because they are political, a possibility that a conservative law and economics largely ignores. Stimuli and responses may differ subtly or significantly, and the poor *may* find an effective representation on the basis of, for example, nonmarket judgments that past distributions of wealth and power were unfair.⁴⁴ Yet, a Third World style of political underdevelopment remains evident in many cities, as an inability to cope with a bewildering variety of demands old and new without lurching towards an authoritarianism. The Chicago School's model of law and economics ignores these problems and possibilities, in pursuit of what Bruce Ackerman calls "an ideological smokescreen for a reactionary assault on the American activist state"⁴⁵ and presumably, on activist

43. HARVEY, *supra* note 2, at 80-81. See also FISCHER, *supra* note 17, at 95 ("The problem created by nonrival, nonexclusive goods is that there is no *voluntary, market* mechanism by which preferences can be reliably revealed."); HARVEY, *supra* note 2, at 114 ("To postulate scarcity as an absolute condition from which all economic institutions derive is . . . to employ an abstraction which serves only to obscure the question of how economic activity is organized."); HEILBRONER & SINGER, *supra* note 1, at 238. Markets arise to cope with scarcity, but scarcity is also socially organized to permit markets to function: "We say that jobs are scarce when there is plenty of work to do, that space is restricted when land lies empty, that food is scarce when farmers are being paid not to produce." HARVEY, *supra* note 2, at 114.

44. See MALLOY, SERFDOM, *supra* note 8, at 3. But see *id.* at 36 ("We no longer seem able to accept the natural dynamic of winning and losing in a competitive marketplace."). Presumably, "natural" is not used here as it is in "natural science" or "the natural order of things" because markets are created by society and are subject to the exertion of wealth and power, fragmentations, and other failures that may lead us to reject marketplace outcomes and to attempt to cure the failures.

45. BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 7 (1983). See *infra* notes 91-111 and accompanying text.

cities as well. Ackerman may exaggerate a bit, and he is a bit out of date: Chicagoans seem amazingly tolerant of a "public entrepreneurship" that creates a good "business climate," even though redistributions favoring the rich are fully as interventionist as redistributions that favor the poor.

The Chicago School provides a strange picture of two socially created giants: almost flawless markets, giving individuals exactly and only what they are willing to pay for, and almost wholly pernicious governments, providing what no one is willing to pay for. Although Chicagoans almost always view government as the problem, government is almost always the solution for contemporary liberals like Ackerman.⁴⁶ Yet, we may have seen enough to know that governmental interventions will be problems and solutions in roughly equal measure, sometimes simultaneously.

C. *Markets and the Poor*

How do mainstream economists analyze the plight of the poor and powerless? The brief answer is: Seldom, and not very well. The desire to preserve their theory intact, in the face of seemingly inconsistent ghetto facts, usually wins out over the desire to help people. Cento Veljanovski accuses the Chicago School of having a necessarily "pro-rich, anti-poor bias."⁴⁷ There must be losers as well as winners in the zero-sum game of neoclassical microeconomics that Chicagoans play. Their analyses retain a tinge of the Social Darwinism that grew up with their beloved neoclassicism late in the nineteenth century, and their

46. Ross Cranston, *Creeping Economism: Some Thoughts on Law and Economics*, 4 BRIT. J.L. & SOC. 103 (1977). For a description of the debate as one of compliant (conservative) versus progressive (contemporary liberal) responses by local government, see Sassen, *supra* note 23, at 250-51. Needless to say, a liberal or radical law and economics is no less ideological than that of the Chicago School, but the Left focuses on "unemployed blue-collar workers left behind by capital flight, the 'missing middle' in the wage structure, displacement caused by gentrification, and the fiscal crises of local governments." Logan & Swanstrom, *supra* note 18, at 9-10. See also MALLOY, LAW AND ECONOMICS, *supra* note 33, at 81 ("Rules are the opiate of the masses" through which mainstream economists legitimate hierarchy and inequality in America.); Fainstein, *supra* note 30, at 140-41 (The failure of the Left to organize a coherent and compelling political program is a major reason for the success of the conservative's "resurgent market ideology."). Ideology cannot be expelled from law and economics analyses; its role should thus be made more explicit, as Malloy tries to do.

47. CENTO VELJANOVSKI, THE NEW LAW-AND-ECONOMICS: A RESEARCH REVIEW 7 (1982) (published by the Centre for Socio-Legal Studies at Oxford, this mildly-critical book is a helpful commentary). See MALLOY, LAW AND ECONOMICS, *supra* note 33, at 64 (conservative law and economics advances the *de facto* morality of "protecting the market model"); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 134 (1980).

market metaphors require that the poor be deemed responsible for their failure to compete. Under their School's more charitable interpretations, the poor are assumed to be facing different but unspecified constraints on their competitiveness. These constraints usually get lost in the analytical shuffle because the analyst does not understand them, and macroeconomic solutions (fiscal policies, programmatic interventions) are cheerfully dispensed with because everything can be accounted for at the micro level of individual behavior. Peter Steinberger generalizes the policy recommendations that result: "when a problem becomes *really* a problem, then something *will* be done about it, if at all possible; though of course, some problems are utterly intractable and must simply be endured."⁴⁸ The specific policy recommendations echo those regularly offered to the Third World: "[b]y reducing taxes and government regulations, cutting social spending to reduce the federal deficit, and creating a good 'business climate' (i.e., one conducive to private capital accumulation), entrepreneurs will flourish again and more wealth will be generated, with enough trickling down to benefit all income groups."⁴⁹

It is difficult for an analyst to make sense of poverty, chiefly that of minorities, when she is neither poor nor a minority, but I will try to sift through a mass of misinformation and polemics. The Kerner Commission tried to do this in 1968 and saw a nation rapidly moving

48. PETER J. STEINBERGER, *IDEOLOGY AND THE URBAN CRISIS* 130 (1985). See HEILBRONER & SINGER, *supra* note 1, at 200, 219 (As in all ideologies, the old — Social Darwinism and the myth of rugged individualism — coexists with the new. This is a departure from the New Deal liberalism that retains some influence today and that refused to blame the victims of an admittedly more widespread economic disaster.); SACKREY, *supra* note 2, at 59, 65; Coleman, *supra* note 5, at 33 (the poor become part of the *ceteris paribus* assumptions of a Chicago School theory enamored with the logical structure that economics gives to legal analysis); Rubinfield, *Introduction*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS*, *supra* note 36, at 1, 6. A conservative law and economics seems to harken back to the ideas of Alexander Hamilton, who "simply accepted social inequality, propertyless dependence, and virtually unbridled avarice as the necessary and inevitable concomitants of a powerful and prosperous modern society." MCCOY, *supra* note 47, at 134. This approach would make some of the critics of mainstream law and economics into modern-day Jeffersonians. See Paul H. Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur*, 22 VAL. U. L. REV. 275 (1988) [hereinafter Brietzke, *Constitutionalization*].

49. Moore & Squires, *supra* note 32, at 98 (describing the "prevailing [American] perspective on economic development" that is arguably based largely on Chicago School theories). See HARVEY, *supra* note 2, at 114; SACKREY, *supra* note 2, at 94 ("The conservative's program to combat urban poverty is ordinarily a simple indifference, buttressed by occasional suggestions . . . about how best to maintain law, order, and civility in poor neighborhoods."). Similar to their advice for the Third World, conservative (and Leftist) prescriptions for the poor and powerless are frequently arrogant, neocolonial, and motivated by a desire to maintain a theoretical purity. See HARRISON, *supra* note 2, at 18-21 (discussing the ideas of Gunnar Myrdal).

toward two separate Americas.⁵⁰ The consequences of this separate development are now fully-formed; ghettos are a persistent sectoral problem that acts as a drag on, and a reproach to, the rest of the economy. No amount of the "free market dynamism" prescribed by conservative law and economics has effected a cure to date. Ghettos and their residents have been the consistent losers in recent economic and political changes. "Free market adjustments" have involved abandoning additional urban areas, areas with crumbling infrastructures and few apparent uses, to the unemployables who cannot join the exodus.⁵¹ There remains "no market pull for . . . low-cost housing, better police protection, cleaner streets" in the inner city.⁵² Just as the poor are in but not of the city, so are they in but not of the markets. They are caught in a grand, Chicagoite *non sequitur*: markets promote economic growth, but it simply does not follow that the life-chances of the poor are naturally as great as they can be.⁵³

Consider a Chicago "market" that exists in the shadows of the Chicago School itself: new car buyers who live in the black Englewood ghetto are "free to choose" (as Chicagoan Milton Friedman puts it) between two finance companies, each charging fifty-two percent interest per year. These creditors may be earning "economic rents,"⁵⁴ illegally fixing prices through a "conscious parallelism,"⁵⁵ or charging interest that is indeed cost-justified by the magnitude of the risks they run. This transaction was formerly called a "juice" loan and (prior to deregulation)

50. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 401 (1968). See HARRINGTON, *supra* note 1, *passim*.

51. Wingo & Wolch, *supra* note 27, at 329.

52. HEILBRONER & SINGER, *supra* note 1, at 238-39 (slums have proliferated because economic growth is market-directed); SACKREY, *supra* note 2, at 38-39; STEINBERGER, *supra* note 48, at 130; Sassen, *supra* note 23, at 239 (Studies show that "the natural tendencies of . . . economic forces, if left alone, override local concerns and undermine the socio-economic conditions of significant sectors of the population." This statement may be true, but the author relies on the same naturalistic fallacy used by the Chicago School.). Rather than opt for New Deal orientations, Robin Malloy prefers the view expressed in Adam Smith's *Theory of Moral Sentiments*: true happiness is attained through a voluntary and almost altruistic compassion and understanding, rather than through wealth. MALLOY, SERFDOM, *supra* note 8, at 22-23. This worthy view can all too easily be trivialized as a "thousand points of light" in today's more cynical political era.

53. See HARVEY, *supra* note 2, at 114-15.

54. See *infra* note 58.

55. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."). This doctrine has been considerably weakened by the Chicago School of antitrust in recent years.

usury or redlining, and it certainly possesses few of the virtues that the Chicago School claims for markets. We could stretch our imaginations and describe such arrangements as occurring in informal or marginal markets, but the reality is that they occur in market *surrogates* designed for survival rather than for the Chicago School's wealth maximization.⁵⁶ These surrogates spring up because the formal structure of the ghetto economy has collapsed, yet ghetto residents remain segregated from conditions in the "real" markets, such as "below-market" interest rates designed to sell overpriced cars and car lease terms that confer tax breaks as "business" expenses. The surrogates erect barriers to entering the real markets and perpetuate the separate (under)development of poverty. With interest payments loaded forward, try paying off one of these loans, even in Chicago School theory, if you don't have so much money that you don't need the loan in the first place because you don't live in an Englewood.

Unable to afford a car and living without reasonable access to public transport, residents of an Englewood lack the mobility to obtain a job in the suburbs. They rationally see little reason to move from one segregated community to another, where conditions will be much the same, and they lack the educational background to enable their retraining for a skilled occupation. They are thus immobile, in contrast to the Chicago School assumption of (near-)perfect mobility of "factors of production" (a dehumanizing characterization) that is epitomized by a multinational capital. In markets, information exposes new threats and opportunities, and it thus overcomes inertia by providing incentives for action. This information does not reach the ghetto because informational "networking" through friends, schools, and other community organizations is segregated and thus restricted. The Chicago School assumption

56. See BRUYN, *supra* note 5, at 27 (discussing the theories of Karl Polany: the Chicago School economic man assumptions apply in the "formal economy," while the "elemental facts of survival" apply to the "substantive economy"). A "market" presupposes site, available goods, a supply and a demand, and the equivalencies necessary for exchange. *Id.* at 28. These conditions are not always present together in slums, where Karl Polanyi's "primitive" (Third World subsistence, in my usage) reciprocal and redistributive systems frequently dominate instead. *Id.* Kasarda argues that "the vast underground economy . . . enables many of those displaced from the mainstream economy to survive." Kasarda, *supra* note 22, at 189. Conservative economists can and do make markets of everything, including marriage. The substantive, underground economy violates so many Chicago School assumptions, however, that it is less confusing to adopt the notion of market surrogates. For examples of ghetto violations of Chicago School assumptions, see *infra* notes 57-60 and accompanying text. These market surrogates are in, but not of, the markets themselves. For example, public welfare assistance serves as a partial surrogate for jobs lost or never found in the first place. See Kasarda, *supra*, note 22, at 190.

of perfect (or at least very good) marketplace information is thus inapplicable to the slums.⁵⁷

In sum, city markets are much more fragmented, uncompetitive, and full of barriers to entry than the Chicago School assumes, especially because the wealthy and powerful seek to keep certain city markets "closed" so as to earn economic rents⁵⁸ and to keep the markets from curing themselves. These conditions foster the nonmarket allocations of resources that can be commanded only through a political entrepreneurship or influence over an entrepreneur — capacities in short supply in the ghetto. There is no *Mount Laurel*⁵⁹ or any other "open city" for the poor and powerless, whose economic isolation better explains the loose attachment some of them feel to the "system" than do sociologists' problematic explanations of "alienation" or "anomie." For example, it is difficult to measure the costs of being cut off from physical and social activities by the fear of crime, a fear that is more rational in the slums than it is in other parts of the city. Cut off from the "real" markets in many ways, ghetto residents are "steered" by market surrogates into certain, uncompetitive neighborhoods, schools, jobs, and sources of credit. A Chicago School analysis could show this steering to be efficient, as a method of subjugation that serves as a barrier to entering the more lucrative markets.⁶⁰

57. See MALLOY, SERFDOM, *supra* note 8, at 67; PORTER, *supra* note 4, at 639; WILSON, *supra* note 30, at 40, 134. See also BREESE, *supra* note 2, at 98-99 (describing an immobility of many Third World city dwellers that is similar to that of American slumdweller); MALLOY, SERFDOM, *supra* note 8, at 67 (The Chicago School's assumption of "the ability to move freely implies a value judgment against the hardship claims of those who fail to uproot their families and relocate."); Kasarda, *supra* note 22, at 190 (discussing the slumdweller's "low perceived marginal utility of migration relative to the opportunity costs of giving up their in-place assistance").

58. Economic rents are the difference between the rate of return in a market where the supply is temporarily or permanently fixed and the rate of return in a competitive market. Talented baseball players earn economic rents because the supply of their skills is narrowly limited. The holder of an exclusive catering franchise at a city airport also earns economic rents because the city has artificially restricted the supply of food and drink. Logan argues that in "place of union jobs at moderate hourly wages, cities now offer a more polarized job market: increasing opportunities in highly rewarded professional and technical occupations . . . and even greater expansion in low-wage clerical, sales, services, and non-union manufacturing." John R. Logan, *Fiscal and Developmental Crises in Black Suburbs*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note 19, at 333, 334. Even if they are lucky, slumdweller tend to obtain the low-wage jobs, like selling newspapers and serving "casual" food. See Rossi, *supra* note 2, at 135; SACKREY, *supra* note 2, at 45.

59. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975) (striking down suburban land-use controls as economically exclusionary and developing attendant doctrines and remedies). See FISCHEL, *supra* note 17, at 261-62 (discussing the *Mount Laurel* "open cities" model and comparing it with the "closed cities" model found almost everywhere else).

60. See HARVEY, *supra* note 2, at 79; SACKREY, *supra* note 2, at 45 (In a "dual"

Several explanations for this separate development have been advanced. The most popular explanation, at least among conservatives, is that slumdweller live in the "culture of poverty."⁶¹ This explanation has also been widely used to explain discrimination and dependence in the Third World. It is certainly true that America's poor are "degraded and frustrated at every turn"⁶² and "that responsiveness to the market economy cannot be taken for granted because it reflects values and ideas even more than material conditions."⁶³ Yet, unlike other cultures, the "culture" of poverty is not self-perpetuating once it is absorbed during childhood. In fact, it usually disappears rather quickly when the poverty is removed. Moreover, the culture of poverty explanation stigmatizes the poor by suggesting that the poor are essentially different from the middle and upper class, and it creates the comforting illusion that we can cure poverty by making "them" think more like "us," that is, in more market-like ways.⁶⁴

The most plausible explanation of poverty and its concentration in minority communities is the discrimination that leads to segregation. That this explanation is not altogether obvious is suggested by William Fischel's excellent book.⁶⁵ On the one hand, Fischel notes "that it is more difficult to enforce antidiscrimination laws in owner-occupied housing. A consequence, perhaps unforeseen, of the acceptance of the primacy of the single-family housing district is the perpetuation of racial segregation in areas hostile to minorities."⁶⁶ Suburban zoning laws are thus

market, "public and private employment agencies, unions, and employers have quite simply reserved certain jobs for black people." These practices are as efficient a means of subjugation as is segregation in housing and education.) and at 96 (discussing an argument, from a structuralist economics, that full employment could return and some people would still be unable to compete); WILSON, *supra* note 30, at 60-61, 133.

61. The culture of poverty assumes that people are conditioned to think of "themselves as unworthy or unable to compete in labor markets, and that ultimately there is established a vicious circle of behavior . . . inconsistent with competition." SACKREY, *supra* note 2, at 54. Demeaning jobs become further evidence of unworthiness. *Id.* at 53. This thesis was originally developed by an anthropologist, Oscar Lewis, to explain conditions in Puerto Rico and elsewhere in Latin America.

62. HARRINGTON, *supra* note 1, at 73.

63. JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s* 47 (1984). If this is indeed the case, the process cannot be as "natural" as a conservative law and economics assumes.

64. See SACKREY, *supra* note 2, at 55; WILSON, *supra* note 30, at 6, 8, 13, 60-61. The notion that the poor are different from us "enables Americans to evade hard questions about changes in the distribution of resources and the structure of society." SACKREY, *supra* note 2, at 55 (quoting Charles Valentine, *The Culture of Poverty: Its Scientific Significance and Its Implication for Action*, in *THE CULTURE OF POVERTY* 216 (Eleanor B. Leacock ed., 1971)).

65. FISCHEL, *supra* note 17.

66. *Id.* at 62 (citation omitted).

a "surrogate" for "racism." Denied access to suburban houses and jobs, the poor bear higher central-city taxes for poorer services and higher housing costs that result from being forced or steered into fewer communities. The poor also lose access to the better "public" schools, those that are open at little or no cost to local residents rather than to the general public.⁶⁷ Armed with such insights, Fischel nevertheless concludes: "The puzzle about the desire of suburbs to exclude the poor is that it does not exist as much in other societies, and it does not seem to have occurred very much in earlier days in the United States."⁶⁸ This puzzle solves itself when we remember that "earlier days" were those of a *de jure* segregation. Times have changed, and the bigotry of discrimination⁶⁹ (which is much less prevalent in most Western European communities) must now assume subtler forms, such as marketplace transactions or zoning and other laws with ostensibly nondiscriminatory purposes that today's judges are reluctant to probe too deeply.

If the main or only criterion for marketplace evaluations is the willingness to pay, this willingness can be based on bigotry with a virtual impunity. Indeed, the Chicago School commands that it be so: the preferences on which this willingness is based are assumed to be subjective and nobody's business but that of the parties to the transaction. Government should not second-guess their willingness or unwillingness by probing its bigoted basis because this would violate efficient private property rights and make the transaction less wealth-maximizing for society. (This is a circular argument. Property rights and social wealth maximization are also defined on the basis of a willingness to pay, and those who are too poor to pay are thus excluded from the Chicagoans'

67. *Id.* at 317.

68. *Id.* at 333. Fischel adds that there is little opposition to low-income housing for the elderly in the suburbs, so that the fear is not of poverty itself. *Id.* at 333-34. See also WILSON, *supra* note 30, at 30, 32. But see MALLOY, SERFDOM, *supra* note 8, at 51 (institutional frameworks of the past provide no guidance because they were biased against women and minorities).

69. "There has never been a disability in American society to equal racial prejudice. It is the most effective single instrument for keeping people down that has ever been found." HARRINGTON, *supra* note 1, at 144. Part of this bigotry is the perception that many minority people choose poverty through a fear of work. *Id.* at 21. After decreasing somewhat, racial antagonisms have increased recently because many "whites" have also been hurt by recent economic and political changes, and the whites will seek to protect their "turf." Cummings, *supra* note 22, at 353. See also WILSON, *supra* note 30, at 136. But see Perry Shapiro & Judith Roberts, *Information and Residential Segregation*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 337, 338 (concluding that "patterns of racial residential segregation do not approximate a minimum-contact pattern" and that "white flight" is a suspect theory). The reader is free to draw his or her own conclusions concerning, *inter alia*, where Shapiro and Roberts's Ivory Tower might be located because they offer no justifications for their conclusions.

calculations at the property, market, and social levels.) Chicago Schoolers like Gary Becker “generally are suspicious of results that depend on prejudiced behavior. “We know that the competitive market exacts a large penalty on agents whose economic actions are governed by irrational prejudice.”⁷⁰ This argument is true, by definition, *if* there are no barriers to entering the market (no segregation for example), *if* the market is indeed competitive, and *if* economic actions consistently win out over irrational prejudice.

Even though the Chicago School does not offer plausible descriptions of life in the ghetto, we cannot assume that poverty flows solely from people having been imported as slaves from Africa centuries ago or that it results exclusively from a contemporary bigotry or from other recent economic and political changes. Robin Malloy offers a sensibly moderate view: “we cannot find guidance on such issues as minority or women’s rights by . . . accepting the institutional frameworks of the past, since such frameworks are from the start biased against women and minorities.”⁷¹ Indeed, he continues, the analysis of these issues “facilitates the political deconstruction of traditional [Chicago School] neoclassical economics because it challenges the very assumption that law should validate market choices.”⁷² Moreover, “[t]he discourse of conservative law and economics is a discourse of exclusion.”⁷³ Kain and Thurow show how the obnoxious economic features of bigotry would remain, even if all minority incomes rose above some minimum level.⁷⁴ Although

70. Shapiro & Roberts, *supra* note 69, at 338 (citing GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957)). If reality matched this description, the slums would still be performing their former role as a “melting pot, a way station, a goad to talent.” HARRINGTON, *supra* note 1, at 139. For a critique of Becker’s position, see BRUYN, *supra* note 5, at 36 (habits, informal networks, and associations affect market behavior, as do social norms concerning property, custom, and the organizational rules that dictate goals other than profit or efficiency); MALLOY, *SERFDOM*, *supra* note 8, at 51; SACKREY, *supra* note 2, at 81. For an example of the confusion generated when Becker’s and Coase’s Chicago perspective is applied to the real world, see Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 25, at 135, 161, 162 (“The fact that market forces tend to produce economically stratified neighborhoods creates a *prima facie* case that this stratification is efficient — that is, if residency rights were fully transferable, richer residents would generally be willing to pay enough to persuade poorer residents to move to other neighborhoods.”).

71. MALLOY, *SERFDOM*, *supra* note 8, at 51. See SACKREY, *supra* note 2, at 62-63; WILSON, *supra* note 30, at 10-11, 30-32.

72. MALLOY, *SERFDOM*, *supra* note 8, at 63.

73. *Id.* at 69-70 (“wealth maximization discourse can ignore the issue of whether African Americans or Hispanics, for instance, have anything to exchange in the marketplace” and whether they “have been systematically deprived of an opportunity to acquire the wealth [and dignity] necessary to bargain voluntarily”).

74. SACKREY, *supra* note 2, at 56-57, 85 (discussing studies by John Kain and Lester Thurow and ascribing this effect to an “institutionalized racism”).

the creation of minority-controlled neighborhoods, businesses, and labor markets would undoubtedly improve the economic position of minorities, it would also further entrench the dualism of a separate development that has already been exacerbated by recent economic and political changes.

D. Poverty as a Market Failure

If slums nurture poverty and if markets nurture slums, then Gary Becker is wrong—unregulated markets do not discipline bigots adequately—and we have a “market failure” on our hands, an “externality” of an otherwise often-marvelous system of social organization. The Chicago School of law and economics recognizes market failures, including externalities and problems with providing public goods,⁷⁵ as the *only* justification for governmental intervention, but Chicagoans then proceed to define these failures so narrowly as to justify only a “night-watchman” form of government. Any wider governmental intervention becomes an externality-by-definition to an efficient-by-definition marketplace transaction. Any regulation or redistribution is criticized because it interferes with the broadly defined property rights that form the basis for a wealth-generating creativity.⁷⁶ Under the Chicago School’s beloved

75. FISCHEL, *supra* note 17, at 95. Unfortunately, the theory of market failure is not as well developed as one might like; it consists of little more than a series of policy recommendations. *Public goods* are those things that belong to everyone and for which no one thus wishes to pay. The per capita benefits from a park or a road may exceed its per capita costs, yet the economically rational consumer will try to reap the benefits without bearing the costs (will try to be a “free rider”). This justifies government’s construction of the park or road (under powers of eminent domain). Beneficiaries pay for the park through their taxes (thus eliminating “free riders” and “holdouts”). *Externalities* are costs (and benefits) to society that are not taken into account by private parties in their transactions. For example, the producer and the consumer of an automobile do not take into account the social costs of the auto’s contribution to air pollution. The consumer may want clean air, yet rationally conclude that his auto makes too small a contribution to overall air pollution to justify the extra cost of buying a pollution-abating auto. Knowing of this consumer attitude, the producer views the manufacture of a more expensive, pollution-abating auto as a recipe for bankruptcy. The only way to reduce pollution may be for the government to order manufacturers to abate pollution or to impose a “tax” on pollution.

76. For the “new” conservatism, government is the ultimate externality. Wingo & Wolch, *supra* note 27, at 317-18. This cannot be taken too literally because a market system requires state intervention in the form of infrastructure and public services. Through coercion, propaganda, and social service expenditures, social control is maintained. Norman I. Fainstein & Susan S. Fainstein, *Restoration and Struggle: Urban Policy and Social Forces*, in *URBAN POLICY UNDER CAPITALISM*, *supra* note 16, at 9, 11. Malloy argues that Houston, the fourth largest, and the last major city without a comprehensive zoning and planning code, evidences both an efficient control of land use without governmental

Coase Theorem,⁷⁷ a utopian construct that is frequently applied without appropriate modifications to the real world, government merely defines property rights initially and then enforces any bargains that subsequently go awry. The Coase Theorem seems to be all but irrelevant to ghettos. Black people, for example, may be unwilling, and they certainly are unable, to exit from a group defined by the color of their skin. They will thus often be unable to contract out of disadvantages that have become attached to their group through a history of past Coasian "bargains" with majority groups.

Other, less conservative economists—such as Pigouvians and other welfare economists, who are common in Europe but an endangered species here,⁷⁸ and the growing number of domestic practitioners of a "progressive" law and economics⁷⁹—assume that markets fail regularly,

regulation and qualities of "congestion, incompatible land use, and urban sprawl." MALLOY, SERFDOM, *supra* note 8, at 90. *But see* Cummings, *supra* note 22, at 16; Johnson, *supra* note 25. One example of a conclusion drawn from Chicago School analyses is the following: people correctly adjust their activities to account for the health risks of smog; the reduction of smog is therefore an unanticipated pecuniary benefit. Carl J. Dahlman, *An Economic Analysis of Zoning Laws*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 217, 230. This may be true for some people, but the poor are often unable to move away from the smog or partially to filter it out with home or auto air conditioners.

77. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). *See* James M. Buchanan, *The Coase Theorem and the Theory of the State*, 13 NAT. RESOURCES J. 579 (1973); Warren J. Samuels, *The Coase Theorem and the Theory of Law and Economics*, 14 NAT. RESOURCES J. 1 (1974). A brief formulation of the Coase Theorem is as follows: If transaction costs (costs of information, negotiation, monitoring, enforcement, and legal errors) are zero, then (1) the parties will contract about all of the costs and benefits of the transaction (they will "internalize the externalities") and (2) the identical (and most wealth-maximizing) allocation of resources will come about through negotiation, regardless of which party is legally liable or has the relevant property right. Transaction costs are obviously not zero in the real world, but the precise significance of this fact is frequently ignored when the analytical frame shifts from theory to practice. *See also* Rubinfeld, *supra* note 48, at 2 (discussing White and Whitman's analysis of a "classic" nuisance law externality problem and the conventional solutions based on private damages suits or a tax on the externality). For a (loosely) Coasian analysis, see Robert C. Ellickson, *Public Property Rights: Vicarious Intergovernmental Rights and Liabilities as a Technique for Correcting Intergovernmental Spillovers*, in ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS, *supra* note 36, at 51, 71 ("What is customary in a particular time and place cannot be a nuisance. Customary behavior tends to be cost-justified behavior (especially when transaction costs are low) because bargaining tends to eliminate inefficient practices."). Note the bias in favor of the status quo and the assumption that bargaining will be feasible (the sufferer will have something with which to bargain) and moral.

78. *See* ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920); CHARLES K. ROWLEY & ALAN T. PEACOCK, *WELFARE ECONOMICS: A LIBERAL RESTATEMENT* (1975).

79. *See* Susan Rose-Ackerman, *Progressive Law and Economics — and the New Administrative Law*, 98 YALE L.J. 341 (1988). Malloy is moderately critical of this and related approaches: "Communitarian (altruistic) and state-centered views of law and ec-

or at least often enough to license an economically activist government. According to this view, governmental regulation stems from the lack of social norms and structures of accountability in the marketplace, and private property rights must be construed more narrowly. The contingency and complexity of the real world makes these ideologically colored interpretations possible. Whatever one believes about the general issue of the frequency of market failure, it follows almost by definition, from the wealth and power allocating functions of markets, that markets must regularly fail the poor and powerless.⁸⁰ Indeed, this is the main reason why there are poor and powerless people in a country that accords so much power to markets, *unless* one adopts one or more of the conservatives' ideological explanations: the poor are stupid, lazy or unlucky, or everything is government's fault.

Few economists realize or admit that market failures (such as fragmentation, barriers to entry and other means of segregation, and a lack of competition) are literally matters of definition, of what we want markets to do that they are not doing. If we want them to ameliorate poverty, the failure to do so becomes a market failure, and by analogy, the failure of a public entrepreneurship to alleviate poverty becomes a *political* market failure. If, on the other hand, we want to preserve the Chicago School theory of the paucity of market failures, we will tend to ignore issues related to poverty.

Needless to say, governments create or exacerbate as well as ameliorate market failures. Analysts attempting an ideological neutrality will thus do a careful cost-benefit analysis of governmental behavior in what

onomics generally lead to conceptual frameworks of liberty that focus on the importance of groups, experts, and planners at the expense of the individual decision makers in the marketplace." MALLOY, SERFDOM, *supra* note 8, at 62. Malloy adds that Bruce Ackerman "delivers us into the Keynesian world of market failures, insurmountable transaction costs and externalities, and the need for liberal intervention and management of social institutions for the common good." *Id.* at 73. For Malloy, this is presumably a deliverance gone astray.

80. See FISCHER, *supra* note 17, at 121 ("Proponents of the property rights approach tend to be politically conservative or libertarian, while proponents of the externality [the "pervasive market failure"] approach tend to be modern liberals or socialists."); *id.* at 122 ("If the externalities approach can be criticized for being perfectionist or utopian, the property rights approach can come dangerously close to a Panglossian outlook."); HARVEY, *supra* note 2, at 88 ("There are . . . good theoretical reasons for expecting that the market mechanism will be no more efficient in guiding the location of privately supplied impure public goods to Pareto equilibrium than it is in the housing market."); MALLOY, SERFDOM, *supra* note 8, at 71 (Liberals and left communarians reject natural rights and place great emphasis on the state.); ROSSI, *supra* note 2, at 203 (Clearly, the housing "market has failed to meet the special needs of unattached poor persons."); WILSON, *supra* note 30, at 42 ("Heavily concentrated in central cities, blacks have experienced a deterioration of their economic position on nearly all the major labor market indicators.").

amounts to a market for urban externalities: amenities and "disamenities." Externalities encompass benefits as well as costs, and neighbors will try to use governments and markets to capture and retain the benefits while passing the costs on to other neighborhoods. This is one market in which the poor are allowed to "participate," so that many of the costs of urban life — crime, pollution, congestion, noise, aesthetic blight — come to rest in the ghettos because the poor can shift these costs no further. In Indianapolis, the "amenity infrastructure" — convention, sports, museum, and performing and visual arts facilities — benefits relatively few but is paid for by all in the form of governmental subsidies that could be used for other purposes.⁸¹ Zoning laws further this game of recouping benefits and passing on costs because, contrary to popular belief, these laws serve to emit, rather than to internalize or otherwise control, externalities. These laws are designed to recoup benefits by keeping what are seen as undesirable people and things *out*,⁸² and their (virtual) absence from ghetto areas serves as a magnet for disamenities.

Poverty may be an externality of unregulated market processes, depending on the economic theory that is adopted. The theory adopted in turn depends on ideological preferences, although the Chicago School account of poverty and its amelioration is particularly implausible and will be repugnant to some.⁸³ Like the rhetorical justifications for nuclear weapons, the discourse of a conservative law and economics has perhaps fallen on hard times, but it similarly remains a powerful legitimization device. Its "science," mathematics, and technical rationality evoke associations of objectivity and inevitability.⁸⁴ More importantly for our

81. See MALLOY, SERFDOM, *supra* note 8, at 108; Bamberger & Parham, *supra* note 5, at 12-13. For another, very different externality that flows from this process, see *supra* text accompanying note 11.

82. Dahlman, *supra* note 76, at 218. See FISCHEL, *supra* note 17, at 252-54, 269-70; HARVEY, *supra* note 2, at 66, 72 (The spatial organization of the city is designed to "protect external benefits and eliminate extreme costs." Externalities are thus distributed through location, and "in general the rich and privileged obtain more benefits and incur lower costs than do the poor and politically weak.").

83. Consider the applicability of G.K. Chesterton's words:

[T]here is that stink of stale and sham science which is one of the curses of our times. The stupidest or the wickedest action is supposed to become reasonable or respectable, not by having found a reason in scientific fact, but merely by having found any sort of excuse in scientific language.

G.K. Chesterton, *Music with Meals*, in PLEASURES OF MUSIC 161, 162 (Jacques Barzun ed., 1951). See MALLOY, SERFDOM, *supra* note 8, at 62, 83.

84. See Carol Cohn, *Emasculating America's Linguistic Deterrent*, in 6(1) PERSPECTIVES ON PEACE AND WAR 3, 3-4 (1988-89) (published by the University of Wisconsin Center for International Cooperation and Security Studies). See also Roger Pilon, *Property Rights and a Free Society*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 369, 375 (Although a theory of rights tied to property is objective and consistent, its justification is weak because it relies on the argument that rights are "God-given.").

purposes, Chicagoans offer trenchant criticisms of the governments on which the more liberal theories pin their hopes, criticisms of political processes which are not constrained by strong rights of private property.

II. GHETTOS AND GOVERNMENTS

Political elites feel insecure in all countries. They thus seek the means to re-election, or to retaining power in other ways, by influencing the outcomes of economic processes. Robin Malloy, who is no particular friend of the Chicago School of law and economics, introduces a critique of governmental practices that is echoed and developed further by the Chicagoans: "All of the virtues and vices that make up American society can be found in the give and take, the politics, and the economics of real estate development."⁸⁵ The vices quickly come to the fore in downtown Indianapolis and many other cities. Malloy finds that "most of the [city's] commercial real estate activity . . . is heavily subsidized, administered by central planning boards, and owned in some significant way by the 'state.'"⁸⁶ He prefers to call this an "urban socialism" or a "state capitalism," rather than a public entrepreneurship, to highlight the otherwise hidden restructuring of our "communal order" and erosion of our traditional values.⁸⁷ State capitalists use "political means and the expansion of the state as a way of avoiding the effort and potential failure of competition,"⁸⁸ that is, of avoiding the good as well as the bad that economic markets bring to society. We thus witness a triumph of the public over the private, of planning over spontaneity, and a drift towards "serfdom where, once again, personal status rather than individual talent and human dignity become the measure of one's worth."⁸⁹

85. MALLOY, SERFDOM, *supra* note 8, at 2. See Coleman, *supra* note 5, at 35 (quoting Lloyd A. Fallers, *Social Stratification and Economic Processes*, in ECONOMIC TRANSITION IN AFRICA 126, 127, 129-30 (Melville J. Herskovits & Mitchell Harwitz eds., 1964)).

86. MALLOY, SERFDOM, *supra* note 8, at 12.

87. *Id.* at 10, 12, 85. I prefer Malloy's "state capitalism" characterization because "urban socialism" implies something not in evidence: an explicit attempt (at least) to meet the needs of the poor and powerless. This is "a simplistic and egotistical conception of the community," which is anchored in a "zero-sum game vision of the world." *Id.* at 10-11. "Corporate syndicalism" is perhaps an even better term, with progress being measured through the glorification of urban structures — an Edifice Complex tactic used by Hitler and Mussolini.

88. *Id.* at 35. Economic competition protects against the tyranny of the state, which then offers institutional protections against private coercion. *Id.* at 34. Yet, the displacement of "impersonal" economic means, by the personal dynamics of special interest groups exploiting each other, impairs officials' "impartiality" and reduces the ability of private capital to act as a check on governmental power. *Id.* at 124-25.

89. *Id.* at 1. An outcome-specific zoning subordinates an "impersonal marketplace" to the personal status-oriented sphere of state." *Id.* at 93.

Malloy does not define who the new serfs are and will be, but we can safely assume that the poor and powerless, who do not loom large in his analyses, will swell their ranks.

A. *Chicago (and Some Other) Critiques*

Malloy provides much grist for the (perhaps dark and satanic) mills of Chicago, mills described for us by Daniel Farber:

[S]pecial interest groups frequently obtain government help in extracting money ["*economic rent*"] from the general public as taxpayers or consumers. . . . These special interest groups [of property developers, for example] are relatively easy to organize because they are small and their members have much to gain. For corresponding reasons the public finds it difficult to protect itself: members of the public have small, individual stakes in any piece of legislation [or land use project], and the large number of people affected makes organization difficult [especially among the poorly organized, and perhaps unorganizable, poor]. . . . Most legislation [and projects], then, will really involve some rip-off of the public, even if it purports to serve the public interest.⁹⁰

Except for the last normative sentence, this seems a fairly accurate description of what goes on in Indianapolis and elsewhere if "government" is understood to encompass the mayor, the mayor's planners and other handlers, and a majority of the city council. The Chicagoans' argument is that these worthies cannot be differentiated on the basis of

90. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1359 (1988) (citations omitted). Farber's main footnote to this statement is worth quoting in its entirety:

See G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-78 (1975). The fountainhead of this theory is M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). More recently, Olson has argued that prolonged rent-seeking ultimately saps stable societies of their economic vitality. See M. OLSON, *THE RISE AND DECLINE OF NATIONS* 41-47 (1982).

Id. at 1359 n.147. Stigler, Landes, and Posner are gurus of the Chicago School of law and economics, and Mancur Olson is a fellow-traveller. See FISCHER, *supra* note 17, at 107; SACKREY, *supra* note 2, at 87-89 (the Chicago model is related to those of a pluralism in political science, and in a heterogenous society, those with problems will organize and enter politics); Kantor, *supra* note 19, at 496 (local popular control is separate from, but not independent of, the market). *But see* FISCHER, *supra* note 17, at 71 (doubting that government can auction off all regulatory advantages because this would turn it into a "protection racket").

their dips into the "porkbarrel," regardless of such municipal separation of powers as the law provides.

To elaborate, ordinances and municipal projects are (like congressional statutes or components in the latest Rivers and Harbors bill)⁹¹ auctioned off to the highest bidder, the person or special interest group paying the biggest "bribe." The bribe may take the legally sanitized form of a political action committee's contribution to a campaign fund or it may be a credible promise (or threat) to deliver a certain number of votes on election day. In any event, this process is *politically* wealth-maximizing in terms of lining the official's pocket or, in what often amounts to the same thing, mitigating his or her political opposition. Entrepreneurship, organizing the "logrolling" of voting and other support for each other's pet, bribed-for projects, ensures that the bribes will keep flowing, especially to the best entrepreneurs who thus acquire seniority and high office because their political opposition has been more fully mitigated. The "honest" councillor or bureaucrat who pursues a purer ideological vision of the public interest and refuses to play the more tawdry games will be dismissed, defeated, co-opted, or if she is committed, talented, and lucky, she will attain a leadership position in a more-or-less permanent political opposition.⁹²

91. H.R. 404, 102nd Cong., 1st Sess. (1991).

92. See FISCHER, *supra* note 17, at 36-37 (zoning as a game in which property rights are expanded "at the expense of the politically effete members of the community"); *id.* at 262 ("closed" cities offer opportunities for economic rents); *id.* at 318 (low-income housing projects are an inefficient way to redistribute income, but they become politically attractive transfers within a geographically based political system); *id.* (the politicians' need to seek re-election doomed the "open-suburbs movement" that presumably entailed few bribes); HARVEY, *supra* note 2, at 73-75 (local government develops and exploits resources, including allocations of governmental funds, in an extraordinarily complex, n-person, non-zero sum game, in which side payments are allowed and are, indeed, essential to the formation of coalitions); MALLOY, SERFDOM, *supra* note 8, at 114 (federal and state government assistance is a cross-subsidy to special interests who can employ political means, at the expense of other cities and projects, to avoid paying many of the costs); MCCOY, *supra* note 47, at 43 (quoting GEORGE WHATLEY, *PRINCIPLES OF TRADE* 337 (London 2d ed., 1774)) (most European statutes are "either political Blunders, or Jobbs obtained by artful Men, for private Advantage, under Pretence of public Good.") and at 47 (merchants and manufacturers dupe government and the public into believing that "'the private interest of a part, and of a subordinate part of the society' was identical to 'the general interest of the whole.'"); Johnson, *supra* note 25, at 8-9 ("in an era when the political system has everyone's property rights 'up for grabs', the owner-occupied single-family dwelling is the safest private property around, given that two-thirds of Americans own their own homes" and they would presumably vote out of office people who decrease their house values too much — especially in the suburbs); Michelman, *supra* note 36; Molotch, *Strategies*, *supra* note 25, at 42 ("Within the growth machine perspective, the paramount underlying force operating within the city is the drive for rents and profits that come from place-specific development.").

Why do courts go along with this apparent (if Chicago School descriptions are accurate) travesty of democracy? Two Chicagoans, Landes and Posner,⁹³ argue that judges ratify porkbarrel outcomes to keep politicians from truncating their jurisdictions or lowering their salaries.⁹⁴ Where judges are elected, they can dip into the porkbarrel themselves, in more limited ways of course. A judicial acquiescence in porkbarrel outcomes, plus the time-consuming procedural due process requirements courts have imposed on legislation over time, serve to increase the permanence of legislation.⁹⁵ This in turn increases the value of the bribes that successful bidders are willing to pay for more permanent legislation.

This is an ingenious analysis. A more plausible one is that courts are caught in a conceptual trap of their own making. Having repudiated their "substantive due process" doctrines after the 1937 "switch in time," courts now believe they have little choice but to defer to legislative judgments about the public interest. In our balkanized federal system that offers so many opportunities to extract economic rents, judges need not pay the same degree of deference to judgments by local governments, yet the cases display a similar reluctance to intervene.⁹⁶ It makes little sense for courts bravely to declare "one person, one vote" and to then permit economic rent-seeking behavior to dilute and corrupt that vote, perhaps to the point where few will vote because organizing for purposes of making bribes is the way results are achieved.⁹⁷

93. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1985).

94. *Id.* at 885.

95. *Id.*

96. After *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court abandoned substantive due process in favor of a "police power model." Except where fundamental rights or suspect classifications are involved, "the Court defers to and adopts as conclusive the legislative decision as to what constitutes the public interest or the general welfare." Norman Karlin, *Zoning and Other Land Use Controls*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 25, at 35, 42. But see *infra* notes 137-39 and accompanying text. Fischel argues that economists neglect the limitations imposed by this police powers model when they argue that "any regulation could be passed and the exceptions sold to the highest bidder. A government that did that would appear more like a protection racket, and not one that operated for the benefit of its citizens." FISCHEL, *supra* note 17, at 71. If the police powers model indeed offers few meaningful constraints, this "protection racket" becomes possible and, the Chicago School argues, likely. The police powers model certainly seems to impose few constraints on the "development" activities of local government. See *id.* at 41; MALLOY, SERFDOM, *supra* note 8, at 96 (in state eminent domain proceedings, courts use the "flimsy" test of requiring a governmental statement that the project will ultimately benefit the public).

97. Compare *Baker v. Carr*, 369 U.S. 186 (1962) ("one man, one vote," as it then was) with *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating expenditure limits in the Campaign Finance Act, and thus facilitating the "bribes" of special interest groups

Like the Chicago School, Robin Malloy sees an overexploitation of the public good of state power.⁹⁸ He continues in a much less cynical vein, however: "Local politicians should engage in a convincing dialogue in order to get sufficient local support for their proposed projects," and "the local residents should be willing to pay the full cost of the benefits they hope to enjoy."⁹⁹ Alas, it is not yet so, for reasons that the Chicago School may exaggerate, but not by very much. The result from this overexploitation of state power is a panoply of government subsidies that rarely create or improve competitive advantages for a community. Rather, these subsidies stifle creativity and market incentives, delay adjustments, and create a dependence.

For Thomas Hazlett, grabbing for the "quick fix" turns us into "regulatory junkies."¹⁰⁰ His druggie metaphor may prove too much, at least about the rent control laws he finds to have subverted the "democratic processes . . . in that no intelligible dialogue is possible."¹⁰¹ If a housing market failure has occurred, perhaps because "democratic processes" had landlords and developers dipping from the porkbarrel too often, then a balance-of-power use of the porkbarrel on behalf of tenants may be necessary to reestablish the "dialogue." (This is an illustration of the economic "theory of the second-best" that the Chicago School disdains, a theory which proves useful when the "best," elimination of the porkbarrel altogether, is unattainable.)¹⁰²

Rent control ordinances may indeed curb the earning of economic rents for the benefit of middle and lower-middle income tenants. Yet, the poor and powerless are the biggest and most consistent losers when nominally democratic processes are played as economic rent-seeking games by the special interests. (Jefferson would be appalled.) A porkbarrel politics operates further to truncate the choices of people who already have too few choices. The poor and powerless balance the costs and benefits of political performances and find these performances seriously

that devalue the votes of those unwilling or unable to bribe). *But see also* MALLOY, SERFDOM, *supra* note 8, at 30-31 (voting offers direct accountability and immediate feedback only at very localized levels, such as the New England town meeting).

98. MALLOY, SERFDOM, *supra* note 8, at 44, 46. A major reason for overexploitation of state power ("overgrazing" of the "commons") is that we allow the state to define the concept of limited government. *Id.* at 44. Real estate development is a good example of overgrazing. *Id.* at 46. For a discussion of overgrazing as a cause of "simmering discontent" in Indianapolis, especially among blacks, see Bamberger & Parham, *supra* note 5, at 18; Hallinan, *supra* note 10.

99. MALLOY, SERFDOM, *supra* note 8, at 136-37.

100. Thomas Hazlett, *Rent Controls and the Housing Crisis*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 25, at 227, 296-97. *See* PORTER, *supra* note 4, at 640, 682.

101. Hazlett, *supra* note 100, at 297. *See* Freilich, *supra* note 28, at 178, 198.

102. *See infra* note 103.

wanting. Their reactions range along a continuum of bemused apathy, anger, and open rebellion, and their only hope is that a few political elites will espouse their causes honestly and effectively. This hope is frequently betrayed; as in the Third World, many opposition elites are co-opted by being given access to the porkbarrel.¹⁰³ Urban governments are thus "soft states,"¹⁰⁴ a concept Gunnar Myrdal devised to explain events in underdeveloped Asian states: they are soft on organized special interests, but far from soft on the unorganized poor and powerless.¹⁰⁵ This is but one facet of a growing political underdevelopment in urban America. Local elites are increasingly incapable of managing by and for themselves because they face a growing dependence on the "foreign" capital and entrepreneurship that seeks to co-opt them and wring them dry.

Is all of this gloom and doom what the New Deal model of political leadership and administrative expertise ultimately brought us? Did the War on Poverty and Community Action Programs so threaten local elites with rival centers of power that they fought their way back into the present system, after the public's memory of the mediocre performance of markets and businesspeople during the Depression had faded?¹⁰⁶

103. An example that probably cuts both ways occurred during the 1991 budget battles in the Indiana legislature. Rep. Brown (D-Gary) proposed a \$450,000 "sprinkle" for a National Civil Rights Hall of Fame and Museum, to be located in Gary. Nancy J. Winkley, *Gary 'Hall' Debate*, GARY POST-TRIB., May 28, 1991, at A1. Believing that this was "the best way to use his clout," he extolled the employment, tourism, and national recognition that the project (the brainchild of former Mayor Hatcher) would bring. *Id.* This caused Senator Rogers (D-Gary) to observe:

I understand what (House) Democrats are doing, and I understand it's our time to be the recipients of projects in our communities. . . . The Republican Party has done that for years.

But I do think there ought to be a method of distribution that is broader than an individual legislator's wishes.

Id. at A6. Senator Rogers believes that a local marina and the Gary Regional Airport have greater revitalization potential than the Museum. *Id.* Prior to the recent shift in legislative power in Indiana, Republicans indeed siphoned off state funds for years to gratify the Edifice Complex in Republican strongholds, most notably in "downtown" Indianapolis and not in Democratic Gary. The residents of Gary lack the resources to create a local porkbarrel with much "fat" in it, and they might be as proud of making the State porkbarrel work for them as they would be of the Museum. Power follows capital, MALLOY, SERFDOM, *supra* note 8, at 20, and there is little of either in Gary. Does it follow that the state porkbarrel should be perpetuated, in a game that the poor and powerless consistently lose in the long run? Democrats could use their power to change the system itself, *if* they are not already wedded to it.

104. See GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 182 (Seth S. King ed., 1977).

105. See *id. passim*.

106. See MALLOY, SERFDOM, *supra* note 8, at 116 (the New Deal carries "all the

As you might imagine, the Chicago School has a very different explanation, one that denies expertise to planners and other bureaucrats and that turns them into key players of special interest politics.¹⁰⁷ Their existence, to say nothing of their salaries and opportunities for "bribes," depends on the inefficient, porkbarrel interventions by governments that license bureaucrats to exercise discretion. Co-opted by the special interest groups active within their sphere of influence, bureaucrats also become a special interest in their own right; their incessant lobbying for greater departmental budgets and discretion thus proceeds apace, to increase governmental power further. Lacking the information and skills to regulate sensibly and to beat marketplace results, bureaucrats nevertheless make much policy to cure or to defend past policy mistakes. Edifice Complex projects have come to be emphasized over those promoting social welfare because elites who pay the planning piper get to call the tune.¹⁰⁸

Chicago Schoolers probably prove too much. We all know selfless bureaucrats who serve a genuine public interest (call them public servants), and there are more than a few politicians (Harold Washington, for example) who give the lie to Chicagoans' pronouncements, at least for a time. Chicago School theories are behind the times¹⁰⁹ and excessively emphasize the local model: the atypical machine politics of Daley the Elder and a Chicago City Council notoriously above average in its venality. The recent economic and political changes I described are not

baggage of the welfare state," most notably that federal solutions are needed for state and local problems).

107. See William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

108. See FISCHER, *supra* note 17, at 32 (planning literature stresses technocratic responses to market failures, but much actual planning reflects planners' self-interest rather than community preferences); HARVEY, *supra* note 2, at 78 (urban planning comes to resemble solitaire because of an imbalance in intergroup bargaining in, for example, the suburban "exploitation" of the central city) and at 90-91 (the lack of information necessary to regulate, and a succumbing to voting pressures, lead to inequity because the poor are unable to leave); MALLOY, SERFDOM, *supra* note 8, at 43, 92, 113; Ellickson, *supra* note 77, at 169-70 (trained in law or urban planning, "professional housers" benefit from an inclusionary zoning, which requires the use of their bureaucratic skills in getting a project approved and funded — in ways that frequently bypass local legislatures); Preteceille, *supra* note 19, at 48, 51 (decentralization has made local governments more interventionist, while the "crisis of Fordist accumulation" challenges the old planning and welfare norms).

109. See Kantor, *supra* note 19, at 509-10 (race and class now divide our cities more than anything else, especially because minorities and prosperous whites have increased both in numbers and in their political activism). Kantor's statement is no more ideologically-charged than statements made by Chicagoans, for whom race and class play little or no analytical role.

adequately accounted for by the Chicago theory, most notably the resurgence of a 1920s-style business managerialism in government and the related political need to attend to marketplace evaluations. These changes are in no small measure a result of the Chicago School political influences for which its own theory does not account. The logic of their theory is that Chicagoans are themselves a special interest group, vying with many others, but consistently against the poor.

The Chicago School is so widely praised and excoriated precisely because it is widely perceived to serve a (neo-)conservative political agenda.¹¹⁰ Regardless of whether this is the Chicagoans' purpose, it is certainly the effect of their attempt to transform America's myth of a rugged individualism into an ideology of the possessive individualism¹¹¹ that government is seen to dull and repress. Chicagoans are right: special interest groups and their bribes certainly do matter, but empirical studies by political scientists and economists show that legislators' ideological visions of the public interest ultimately matter as much or more. Economic growth is not the province of the private sector alone, and redistributions are not attributable to governments exclusively, regardless of the dogmas of neoclassical economics.¹¹² Efficiency is important, and there is too little of it in government, but there are other goals such as environmentalism, ameliorating poverty and racism, and making the rubble bounce several times in the unlikely event of a nuclear war, that are legitimated in a democracy by the public support they periodically receive.¹¹³ In other words, governments are much more than the alternative suppliers of goods and services to households that the Chicago School believes them to be.

B. *The Unrealized Potential*

Samuel Beer has long made an argument similar to one heard in the Third World: an American nation-building, "within a liberal dem-

110. See ACKERMAN, *supra* note 45; VELJANOVSKI, *supra* note 47, at 7; Moore & Squires, *supra* note 32, at 98; Michael W. McConnell, *The Counter-Revolution in Legal Thought*, 41 POL'Y. REV. 18 (1987); Wingo & Wolch, *supra* note 27, at 317-29.

111. See CRAWFORD B. MACPHERSON, *THE THEORY OF POSSESSIVE INDIVIDUALISM* (1962). See also HEILBRONER & SINGER, *supra* note 1, at 199 ("The workable basis for rugged individualism had gone with the industrialization and urbanization of the country.").

112. See Clavel & Kleniewski, *supra* note 5, at 228.

113. Farber, *supra* note 90, at 1361. See BRUYN, *supra* note 5, at 331-33 (community development corporations, ideally "social democratic corporations acting on behalf of the whole community," and the Albany Symphony Orchestra are syntheses of the private and public sectors which are essentially new organizational forms); MALLOY, SERFDOM, *supra* note 8, at 11 ("Structural changes in legal economic discourse reveal inconsistencies between surviving forms of free market rhetoric and dramatic ideological shifts in foundational social norms.").

ocratic framework . . . in which vast numbers of both black and white people live in free and equal intercourse," is now no less important and challenging than was the Founders' initial formation of our nation-state.¹¹⁴ The United Nations' Conference on Human Settlements defines the relevant issue: "Basic human dignity, is the right of people, individually *and* collectively, to participate directly in shaping the politics and programs affecting their lives."¹¹⁵ These are brave words and a tall order, in light of the Chicago School's political cynicism that often seems so well taken. A beginning can be made, nonetheless, along the lines suggested by Robin Malloy: the "continuous tension between the benefits and costs of government activities requires a concern for process."¹¹⁶

A necessary, but not a sufficient, step is clearing the policymaking streams that have arguably become clogged and polluted since the New Deal. We could eliminate much of the conceptual underbrush that has grown up, in law and in economics, by applying a *Baker v. Carr*¹¹⁷ writ large among the branches and levels of government. Accordingly, we could ascertain more precisely the limits on effective government posed by constitutions *and* by an institutional incompetence, foster a more efficient pursuit of public policy by revising the division of labor among the branches and levels of government, provide the means for creating more manageable and consistent legal standards, strike a better procedural balance between the desires to avoid inflexibility and delay and the needs for considering all relevant factors and for an adequate representation of the underrepresented, preserve judicial power to question political decisions when there is an "unusual need" to do so, and open up public *and* private channels of communication.¹¹⁸

Justice Brennan sees the First Amendment as playing a "*structural* role," in this process, one of promoting an informed and robust debate

114. Freilich, *supra* note 28, at 175 (quoting Samuel H. Beer, *The Idea of the Nation*, THE NEW REPUBLIC, July 19 & 26, 1982, at 23)). See HARRINGTON, *supra* note 1, at 155-56 (a "mobilization of the spirit" would arguably be required, something that "the wall of affluence," and socialism for the rich and free enterprise of the poor do not seem to permit at present).

115. *Declaration of Principles*, *supra* note 6, at 348.

116. MALLOY, SERFDOM, *supra* note 8, at 26. Falsely, "[w]e believe that the right people in the right positions with the right resources can solve all of our difficulties." *Id.* at 36. "We no longer seem able to accept the natural dynamic of winning and losing in a competitive marketplace." *Id.* Yet, it is not necessarily "natural" that the poor are consistent losers or that markets are competitive.

117. 369 U.S. 186 (1962).

118. See *id.* at 217; GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 175 (1981); Ellickson, *supra* note 77, at 72-73 (the central problems are how to draw boundaries, and upon which level of government rights should be conferred). But see JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

on public issues.¹¹⁹ Those steps that bring about effective governmental action are also those that broaden and inform the debates through which a consensus is discovered. A badly informed public (a market failure, as even the Chicago School might admit) sends inconsistent messages to politicians and enables the special interests to dominate by manipulating information and influence. Our consensus-forming institutions have deteriorated in recent decades,¹²⁰ a political market failure that the Chicago School might not admit. Coalitions are fleeting, attention spans are short, and both are directed at choices between polarized, simplistic solutions.¹²¹ These institutions should be rebuilt structurally, so that, subject to constitutional constraints, we may safely implement whatever policy package the majority wants, even if the Chicago School does not like the package.¹²²

This policy package could be implemented only by rather activist governments, and the latest surveys show that Americans are losing their fear of such governments.¹²³ The New Deal or Great Society *may* have diagnosed the wrong market failures or sought to curb them by the wrong means. This does not mean that governments are forever barred from diagnosis, prescription, and otherwise exerting political leadership, if for no other reason than politicians want to remain in office and must therefore try to fix things the public perceives to be broken. The Chicago School is blind to this matter and fails to recognize that America is, has been, and will be a mixed economy.¹²⁴ A politician's failure to

119. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring).

120. IRA C. MAGAZINER & ROBERT B. REICH, *MINDING AMERICA'S BUSINESS: THE DECLINE AND RISE OF THE AMERICAN ECONOMY* 377-78 (1982).

121. *Id.* at 378.

122. MALLOY, *SERFDOM*, *supra* note 8, at 24, 54. See FISCHER, *supra* note 17, at 35 (zoning boards of appeal must serve as mediators between developers and neighbors); Paul H. Brietzke, *Public Policy: Contract, Abortion, and the CIA*, 18 VAL. U. L. REV. 741, 918-22 (1984); Coleman, *supra* note 5, at 36 (a close statistical correlation in the Third World exists between economic development and political competitiveness); Fainstein & Fainstein, *supra* note 76, at 11-12 (the capitalist state plays important roles of mediating between classes and among conflicting goals, and of occasionally responding to the political power of the working class). *But see* MALLOY, *SERFDOM*, *supra* note 8, at 30 (classical liberals like himself seek the "establishment of a process capable of stimulating and maintaining a creative and everchanging spontaneous order," an order which requires "multiple and competing sources of power and authority"). Perhaps I am overly influenced by the Chicago School, but the altruism and spontaneity Malloy hopes for seem implausible.

123. LINDA L.M. BENNETT & STEPHEN E. BENNETT, *LIVING WITH LEVIATHAN: AMERICANS COMING TO TERMS WITH BIG GOVERNMENT* (1991). See Chris Raymond, *Book Review*, CHRON. HIGHER EDUC., May 15, 1991, at A6.

124. See BRUYN, *supra* note 5, at 4-5 ("Despite the popular belief that the market's invisible hand leads to the general good, government policies have always played a major

intervene in economic processes can often be taken as a tacit acceptance of the status quo, because most politicians feel that they can and should change most things they do not like. In cities, the market for "amenities (or lack of disamenities)" is arranged through zoning and other political interventions "to approximate a solution to the public goods problem."¹²⁵ Unlike the Chicago School, politicians know that a fiscal Micawberism¹²⁶ need not prevail; the fiscal limits on governments are different from those on individuals and, "to avoid a crisis of legitimacy [a contingency that Chicagoans totally ignore], the state must compensate for the social outcomes of market processes by offering income support and public services . . . to people unable to achieve a subsistence wage within the market system."¹²⁷

Ideally, governments would be structured to maximize the contributions both they and markets make to the solution of carefully defined policy problems. Markets offer useful standards for comparison with governmental actions in an inevitably mixed economy. Rather than push near-perfect markets and play down fatally flawed governments, as the Chicago School urges them to do, policymakers can easily study the real world results that flow from often fragmented, segregated, and otherwise uncompetitive markets. These results pose a series of questions

role in determining whether the market will function in the public interest." The question is whether the market can regulate itself, with few oligopolies and other destructive and exploitative side effects.); *id.* at 255 (When the profit sector fails in matters of equity, the problem can be corrected through . . . nonprofit organizations such as trade associations or government institutions, which are better prepared to achieve this value."); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 177-79, 440, 454, 465 (1985), *cited in* MALLOY, *SERFDOM*, *supra* note 8, at 162 n.7 (supporting the notion that *laissez faire* in America has been long on rhetoric and short on reality); JAMES W. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977); MALLOY, *SERFDOM*, *supra* note 8, at 162 n.7 (citing JOHN GRAY, *LIBERALISM* 26-36 (1986)) (there has never been a true period of *laissez faire*); Coleman, *supra* note 5, at 31 (whatever role *laissez-faire* may have played in the past, it has "long since been transcended by varying but substantial forms of *étatisme*"); Logan & Swanstrom, *supra* note 18, at 3; Harry N. Scheiber, *The Road to MUNN: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 327 (Donald Fleming & Bernard Bailyn eds., 1971).

125. FISCHER, *supra* note 17, at 72.

126. Wilkins Micawber was a character in Charles Dickens's *David Copperfield* who was "noted for his alternate elevation and depression of spirit, hearty appetite, reckless improvidence, his troubles, and for his 'waiting for something to turn up.'" WEBSTER'S NEW INT'L DICTIONARY 1551 (2d ed. 1937).

127. Fainstein, *supra* note 30, at 122 (citations omitted). See Kirlin & Marshall, *supra* note 22, at 353-54; Richard R. Mudge & Kenneth I. Rubin, *Urban Infrastructure: Problems and Solutions*, in *URBAN CHANGE AND POVERTY*, *supra* note 15, at 308, 341-42. But see MALLOY, *SERFDOM*, *supra* note 8, at 62 ("state-centered views of law and economics generally lead to frameworks of liberty that focus on the importance of groups, experts and planners at the expense of individual decisionmakers in the marketplace").

or challenges. Would the outcomes from governmental interventions be better or worse than marketplace results? Should policymakers try to beat market results or to reform markets and then allow them to generate the desired results? To what precise extent is private initiative disciplined by real world markets, and when should public initiatives defer to it? In particular, do markets provide too little or too much of a reward to *political* skills and productivity?

Answers to such questions could be implemented by enacting a neoclassical presumption into law, one that is rebuttable rather than (as the Chicago School would wish) conclusive: leave matters to a private initiative in markets, unless it can be demonstrated (in ways that attract an informed consensus) that governmental interventions will reduce broadly defined market failures on balance. Many of the props are already in place for such a scheme; it amounts to an "economic constitution" with the antitrust laws as its centerpiece,¹²⁸ although a great deal of fine-tuning would be required. Briefly, general principles and a more sophisticated judicial review are needed, rather than the unreviewed, outcome-specific rules that currently favor special interest groups. The logical starting points would be those areas where economic rent-seeking behavior is most prevalent: "tariffs, defense contracts, public works projects, direct subsidies . . . government loans,"¹²⁹ and their equivalents at the municipal level.

Michael Porter's highly regarded book argues that competitive advantage is achieved through a competitive adversity; rather than succumb to "the false allure of concentration, collaboration, and protection,"

128. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (antitrust law is "the Magna Carta of free enterprise" and is as "important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Brietzke, *Constitutionalization*, *supra* note 48. See also MALLOY, *SERFDOM*, *supra* note 8, at 3-4 ("we can begin to see our own system of constitutional checks and balances as a legal construct intended to mirror the competitive market metaphor of economics"). My view is slightly different from Malloy's. Checks and balances, federalism, and a separation of powers are political *market failures designed into* the document, to counter the economic market failures that foster the "vice of faction" that worried Madison in Federalist No. 51, and that would now comport with an economics theory of the second-best directed against a special-interest politics.

129. Farber, *supra* note 90, at 1361. See MALLOY, *SERFDOM*, *supra* note 8, at 92. See also RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) (discussing theoretical issues of political philosophy and jurisprudence, including social justice and economic equality); MALLOY, *SERFDOM*, *supra* note 8, at 136-37 (Under classical liberalism, general principles are preferred to outcome-specific rules. A city's public-private partnerships should be subject to meaningful constitutional constraints; the information required for evaluation and accountability should be widely available, and the standards of the city's liability and obligation should be the same as those imposed on a private developer or lender.).

government should act “as a *pusher* and *challenger*.”¹³⁰ Stringent safety, environmental, and energy-efficiency regulations would both improve our standard of living and force an upgrading of American products, perhaps to the point where they could compete successfully with those from Germany and Japan—where producers prosper under stringent regulations.¹³¹ Needless to say, these pushes and challenges need to come from the federal government, and they are unlikely so long as the special interests rule in Washington. If a city were to attempt these tactics, aggrieved producers would move away or argue that the interstate commerce clause stood violated.

III. GHETTOS AND LAWYERS

The analysis so far leaves us between the proverbial rock and hard place. This is a position lawyers regularly find themselves in, but rarely with so little guidance. The Chicago School cleverly demonstrates why governments have done so little to alleviate poverty, but its proposed cure — basically, let markets and strong private property rights do it all — seems inhumane as well as implausible. The best we can do is to build upon an unrealized potential for selective interventions by selectively restructured governments, a solution that will please no one, but that will be rejected outright only by ideological true believers. If politics is too important to be left to the politicians, so too is economics too important to be left to the economists or perhaps worse still, solely to law and economics experts advising politicians.¹³² Lawyers have three roles to play in the process of urban development: as problem-solving generalists, as players who are professionals at dealing with values, and as planners.

First, lawyers have a useful generalist's or synthesizer's role to play, if we can shed some of our formalism and positivism. (This is a feat many economists are unable to manage.) Our method is one of solving problems, and we are much less guardians of a cherished theory than are economists and much less guardians of routine and ghetto underdevelopment than are politicians and bureaucrats. Our technique requires a clear definition of the relevant issues, and we can thus ask economists, politicians, and bureaucrats to clarify matters and to determine relevance.

130. PORTER, *supra* note 4, at 681. *See id.* at 117 (“Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry.”); *id.* at 672 (innovation requires activism by companies; government is only an indirect “facilitator, signaller, and prodler”).

131. *Id.* at 647-48.

132. KHOR KOK PENG, *MALAYSIA'S ECONOMY IN DECLINE* 154 (1987).

This may not sound like much, but analysis and public policy frequently drift from one unclear premise to another. Having to explain what one is doing to a lawyer frequently clarifies one's thinking and helps to avoid mistakes. We are trained to deal with changes occurring within a framework of stable but imperfect institutions. Lawyers often succeed in eliminating contradictions, in setting politically acceptable priorities when contradictions cannot be eliminated, or in otherwise finding the basis for a compromise settlement.

A second lawyer's role concerns our familiarity with values. We throw "rights" and "free speech" around as if these were concrete entities. This is unscientific (unquantifiable) behavior for the economist, and it certainly is more than a bit sloppy. Yet, if someone does not actively and constantly pursue these values, they will be forgotten or drowned in a special interest politics. Chicago School economists often deal with values by asking, for example: How much is free speech worth, how much are you willing to pay for it? This is not a useful perspective on distributive justice because, by definition, the poor are unable to pay as much as it takes to protect their rights effectively.¹³³ Devising the means to implement a compelling theory of distributive justice¹³⁴ is, in fact, the single most important contribution lawyers can make, both to urban development and to ameliorating ghetto miseries.

The lawyer's first two roles come together in their third planning role. Someone must systematically link new goals and values with institutions because "[i]deal justice enters into nonideal politics by way of the natural duty to establish just institutions."¹³⁵ The conventional planners' solution is often to cater to special interest groups or to spawn new institutions that create confusion, but seldom work better than the institutions they replace or circumvent. There is too little monitoring of the interaction among policies, of the techniques that the policies call forth, and of institutions. A better balance and more equalizing outcomes can be created through a careful administrative law planning, with precise definitions of bureaucrats' tasks, better means of evaluating their performance,¹³⁶ and a handicapping of the institutional and other interest

133. Like Oscar Wilde's cynic, the economist *ex officio* is said to know the price of everything and the value of nothing. The world the economist would create might be a rather sad place, although wealth maximization is supposed to make everyone happy.

134. See *infra* text accompanying notes 148-68.

135. GERALD M. MEIER, *EMERGING FROM POVERTY: THE ECONOMICS THAT REALLY MATTERS* 232 (1984). See MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE* 1 (1985) ("Justice is the first virtue of social institutions, as truth is of systems of thought.") (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971)). For a lawyer, this "natural duty" presumably arises under a natural law (which can but need not fall prey to the naturalistic fallacy).

136. In the Law Reform Commission of Canada, *Policy Implementation, Compliance*

group horse race. Lawyers should advocate a *planned* redistribution of rights and privileges (and the wealth that flows from them), within a scheme that maximizes equality gains from a minimum loss of liberties. Otherwise, a casual proliferation of economic rights through failed markets operates to favor elites and to further entrench ghetto miseries.

A. *Some Tentative Recommendations*

Lawyers should be able to devise the kinds of process-oriented reforms outlined in the last section, to achieve a better fit between democratic governments and the problems these governments face. If our focus is the problems of ghettos, such a step is indeed necessary but it is not sufficient. The rules of the political games could change substantially, and bigotry and ghetto market failures would still be endemic. Lawyers might thus have to do something *substantive* to alleviate ghetto problems. This is a scary prospect, as the attitudes voiced at most law faculty meetings presumably demonstrate. It raises the specter of a substantive due process that was thought to be safely buried after the Supreme Court's 1937 "switch in time." The only recent judicial venture into something that can be characterized as a substantive due process with *some* plausibility is *Roe v. Wade*¹³⁷ and its progeny, but abortion rights have hardly been an analytical or political success. Fortunately, *United States v. Carolene Products, Co.*¹³⁸ could be revived to deal with the issue. Although *Carolene* appears to be a process-oriented decision, it is actually substantive or outcome-oriented in nature, yet it avoids the substantive due process pitfall. *Carolene* triggers a "more exacting scrutiny" when rules or projects discriminate *against* "discrete

and *Administrative Law* 80 (1986) (Working Paper No. 51), the Commission concludes that the "planning of policy implementation involves important choices about institutions and instruments for influencing private [and public] behaviour. Each has its inherent capabilities and drawbacks in any given political and socio-economic context." Within their context, the Canadians emphasize the following variables as influencing choices of institution and technique by public administrators: the amount and type of change in behavior required and how quickly change should occur; whether public support or resistance is anticipated; the adequacy of resources available for implementation and the characteristics of the relevant administrators; the extent to which the desired behavior can be accurately defined and quantified in law; how easy it is to collect information about compliance and to detect violations, the relative speed, simplicity and predictability of legal mechanisms, and their capacity to deal with initial public opposition; and the normative context within which the law operates. The Commission calls for the use of "compliance specialists" or "internal ombudsmen" who would coordinate activities and force the bureaucracy to control itself. *Id. passim*.

137. 410 U.S. 113 (1973).

138. 304 U.S. 144 (1938).

and insular minorities” and when political processes are unlikely to cure this defect.¹³⁹

A political cure is unlikely so long as the Chicago School analysis of governmental processes remains fairly accurate, and ghetto residents make up a plausible “discrete and insular” minority. Segregated from broader economic and political markets and “kept in their place” by the fears of the affluent majority, most ghetto residents are readily identifiable by the color of their skins or by their accents. The correlation between ghetto residence and a discreteness and insularity is not perfect, but it is close enough. For example, “poor whites” are not much feared by the affluent, especially if they are elderly, but most poor whites no longer live in ghettos. It should be easy to convince interested officials that an affirmative action on behalf of ghetto residents is permitted under *Carolene*, but can today’s judges also be persuaded to apply *Carolene*?

Important urban development cases tend to combine due process, equal protection, and takings (eminent domain and just compensation) issues together in complex and confusing ways. Faced with this mélange, most judges take refuge in the New Deal model of police powers, and they thus defer to political judgments. Yet, a genuine human development is a more proper “public purpose” or “public use” than is the Yupification that passes for urban development under recent, looser definitions of the public purpose.¹⁴⁰ These definitions should be tightened up, so that government power improves the economic environment for everyone, especially for ghetto residents, rather than merely serving to record the outcomes from bribes by special interest groups. *Carolene* offers an appropriate means to this end. Judges are encouraged to probe deeper, but not much deeper, into the discriminatory bases for political

139. *Id.* at 152-53 & n.4. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1523 n.9 (2d ed. 1988); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (a member of the “progressive” school of law and economics, urging an expansive interpretation of *Carolene*); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the “Inside-Outsider”*, 134 U. PA. L. REV. 1291 (1986).

140. Compare *supra* notes 123-24 and accompanying text with *Berman v. Parker*, 348 U.S. 26, 32 (1954) (approving broad use of eminent domain in urban redevelopment because “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive”) and *People ex rel. City of Urbana v. Paley*, 368 N.E.2d 915, 921 (Ill. 1977) (upholding the government’s use of industrial revenue bonds for downtown commercial development because “stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public weal”). See FISCHER, *supra* note 17, at 32, 43; MALLOY, *SERFDOM*, *supra* note 8, at 14 (eminent domain powers used in Pittsburgh to transfer substantial property from one private party to another) and at 90-91 (discussing the broad police powers model of *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)); Mandelker, *supra* note 25, at 4-5.

action, yet all close judgment calls would be resolved by deferring to political judgments under the police powers model. Some conservative judges, especially those worried about being tarred with the substantive due process brush, would welcome this means of striking down the more blatant of special interest group bargains.¹⁴¹

The United Nations' Conference on Human Settlements states that a "human settlement policy must seek harmonious integration or co-ordination of a wide variety of components, including for example, population growth and distribution, employment, shelter, land use, infrastructure and services."¹⁴² Market processes provide many, but not all, of the integrations needed to promote the fullest measure of "synergistic interactions" that would enhance urban standards of living in the United States.¹⁴³ As Robin Malloy's book illustrates, conventional planning processes have, at best, made marginal contributions to an urban synergy. Law has a tremendous integrative potential, but this potential is largely ignored if we follow the Chicago School recommendation of having laws that merely mimic markets. Such a recommendation makes little sense in the ghettos, where acute legal failure perhaps mimics chronic market failures. The Chicago School assumes that national and local economies are regularly brought into an equilibrium by marketplace activities, but economies are in fact often in disequilibrium and chronically so in ghettos.¹⁴⁴

141. MALLOY, *SERFDOM*, *supra* note 8, at 552. See Dahlman, *supra* note 76, at 221-23. See also Mandelker, *supra* note 25, at 7-9 (discussing state court decisions that approve exercises of eminent domain over areas that are not blighted). *Pioneer Trust & Sav. Bank v. Village of Mt. Prospect*, 176 N.E.2d 799 (Ill. 1961) contains a cruel value bias: when an "exaction" (such as inclusionary zoning) is imposed as a precondition to permission to develop, this exaction must be uniquely and specifically related to the development in question. The need for additional school and public recreational facilities was not uniquely attributable to the particular development in *Pioneer*. In other words, developers are free to keep the economic rents "earned" as a special interest group, and government cannot siphon off part of them for the benefit of the poor generally. See *supra* note 49. A *Carolene Products* perspective would change this kind of thinking and change case outcomes that deny poor people the standing to challenge political arrangements affecting them precisely because they have been denied access to a special interest politics. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975). But see Farber, *supra* note 90, at 1360 ("the rent-seeking model, if taken seriously, would require much broader judicial review than even the *Lochner* Court contemplated"). I disagree with Farber and argue that a *Carolene Products* approach would result in marginal changes that would benefit the poor.

142. *Declaration of Principles*, *supra* note 6, at 347.

143. Berger & Blomquist, *supra* note 15, at 67-68.

144. See HARVEY, *supra* note 2, at 63 ("the inflexibility of a city's spatial form [generates] almost permanent disequilibrium in the city's social system"); Coleman, *supra* note 5, at 33 ("Economics is concerned with market phenomena in nationally-integrated economies. Where these do not exist, its analytical techniques are non-operative."). See

Even more centrally, the Chicago School ignores a democratic government's right and duty to mediate among groups in society. So far as the ghettos are concerned, this integrative function often takes the form of an activist enforcement of broadly defined civil rights laws, although the Reagan-Bush Administration would not have it so. The forms of bigotry grow ever more subtle and sophisticated as people become more skilled at dissimulating their prejudices. Civil rights enforcement must therefore be tied to broader moral issues and questions of social organization. A zealous "guarding of someone's civil rights assuredly cannot mean leaving that person in a condition of immediate and considerable physical risk, else the concept of 'civil rights' is stripped of all practical meaning."¹⁴⁵ Integration of a few schools, neighborhoods, and jobs — deeply problematic steps by themselves — does much less to integrate markets for production and distribution than is commonly supposed. Ghetto market surrogates must also be forced back from the periphery and into mainstream markets, through improvements in the mobility of resources that should also enhance marketplace efficiencies in the long run. For example, a stricter enforcement of fair housing and fair hiring laws is a necessary, but not a sufficient, cure for market failures when entry-level jobs are located in the suburbs while would-be employees live in the ghettos. Access to computerized job search facilities, van pooling, and relocation subsidies are also needed to make this "civil right" effective.¹⁴⁶

B. *Distributive Justice*

Inevitably, the implementation of civil rights measures raises issues of distributive justice. This may be why some conservatives oppose the enforcement of civil rights. Lawyers of all political persuasions should feel some responsibility for implementing distributive justice simply be-

also supra note 36 and accompanying text. Perhaps the most interesting kind of integration concerns (perhaps a sociological theory of) knowledge about urban development. Some economists know that the benefits of economic growth will "trickle down" to the poor, while some of the poor know this to be nonsense and an unjust perspective on their plight. How can this knowledge be shared and otherwise put to good use under law, given that no one has a monopoly on wisdom?

145. ROSSI, *supra* note 2, at 198. See WILSON, *supra* note 30, at 132-33; Fainstein & Fainstein, *supra* note 76, at 11-12. Since 1980, the federal government's passivity in civil rights enforcement and its abdication of responsibility for the poor have become part of a program to remove government from the business of promoting social change, except in those areas where neoconservatives take an interest, such as imposing national moral standards over abortion. Freilich, *supra* note 28, at 161-63, 177-79.

146. Kasarda, *supra* note 22, at 193. See HARVEY, *supra* note 2, at 63 (without public housing constructed near suburban job opportunities, there is little hope of a "natural equilibrium solution").

cause it is a part of justice as most legal philosophers define it. If lawyers do not look out for endangered species of justice, who else will? Certainly not politicians looking for bribes from special interest groups and certainly not mainstream economists.

Most economists have little patience for something so vague and "unscientific" as theories of distributive justice. Admittedly, these theories often take the form of an imprecise formula: from each according to his ability, to each according to his needs, his moral or social merits, his contribution to political success, or his efforts. The economist is also frequently caught applying a tacit formula of justice: from each according to his ability and to each according to his "marginal productivity" measured in terms of the willingness of others to pay. Thus a rock star is manifestly more valuable to society than a teacher or a garbage collector (a "waste transfer specialist"), because a rock star is paid more through "competitive markets." (This is little more than a tautology: a rock star is paid more because a rock star is paid more.) Theodore Schultz may be right: "if we knew the economics of being poor we would know much of the economics that really matters."¹⁴⁷ Yet, poverty too seldom provides economists with much intellectual stimulation, and economists seldom worry about the "less analytically rigorous" distributive consequences of their efficiency prescriptions. Practitioners of a conservative law and economics frequently see themselves as guardians of a rationality that curbs lawyers' and others' soft-headedness in economic matters. Economists' hardheadedness frequently comes across as a hard-heartedness towards the poor, however, and lawyers may thus want to offer policymaking options that combine hardheadedness with a soft-heartedness toward the poor.¹⁴⁸

The advocacy of creative policy options is all the more urgent in light of recent changes. "Market forces" have redistributed additional resources away from the poor, who have been relegated to a lowly position on the agenda of an entrepreneurial politics. They have been treated to "so-called free enterprise solutions,"¹⁴⁹ solutions that are cheap

147. Gerald M. Meier, *The Meaning of Economic Development*, in LEADING ISSUES IN ECONOMIC DEVELOPMENT, *supra* note 10, at 2 (quoting Theodore W. Schultz, on accepting the Nobel Prize in Economics, 1979). See William R. Cline, *Distribution and Development*, 1 J. DEV. ECON. 359, 370, 374, 380 (1975).

148. See Meier, *supra* note 147, at 3-5; PIGOU, *supra* note 78, at 5 ("It is not wonder, but rather the social enthusiasm which revolts from the sordidness of mean streets and the joylessness of withered lives, that is the beginning of economic science."). This has not often proved to be the case, in economics *or* in law, but it has provided the poor with some useful allies.

149. Freilich, *supra* note 28, at 177. See HARVEY, *supra* note 2, at 61, 79, 86; McCoy, *supra* note 47, at 134; Moore & Squires, *supra* note 32, at 98, 108; Wingo &

if nothing else, and recurrent fiscal crises at all levels of government appear to constrain additional redistributions through taxation and expenditure policies. Recent public opinion surveys on the subject seem ambiguous. While people continue to complain about paying taxes and the young report a declining sense of civic obligation, we increasingly favor more government spending on a wider variety of social programs.¹⁵⁰ Under an adroit political leadership such as Roosevelt's, ambiguities in public opinion could be made into a consensus over a greater measure of distributive justice. Some Democrats will combine altruism with self-interest and follow the lead of Jesse Jackson's Rainbow Coalition, but in their own ways and for their own programs, if they can find the votes by organizing poor people into more effective interest groups and by making the plight of the poor more compelling to the general public. Homelessness is currently a "social problem" because the homeless are visible, sleeping on grates and in airports, and their manifest inability to attain the warmth and security most of us associate with "home" is deeply affecting.¹⁵¹ Yet, other poor people will remain invisible and

Wolch, *supra* note 27, at 317 (the "new conservatism" believes a bigger pie to be more important than redistribution, in what is seen to be a zero-sum game); Hallinan, *supra* note 10 (Blacks were promised much, but obtained little, from redevelopment in Indianapolis).

150. BENNETT & BENNETT, *supra* note 123, at 20-50; Raymond, *supra* note 123, at A6.

151. Rossi, *supra* note 2, at 14. See HARVEY, *supra* note 2, at 81 ("the rich are unlikely to give up an amenity 'at any price', whereas the poor who are least able to sustain the loss are likely to sacrifice it for a trifling sum"); Bamberger & Parham, *supra* note 5, at 18 (group protests in Indianapolis focus on "approaches . . . to foster development, the openness of the decisionmaking process, the nature of the projects being undertaken, and the longer term impacts"); Clavel & Kleniewski, *supra* note 5, at 223-24 (Chicago's populist mayor, Harold Washington, was a skilled political dramatist, but his coalition proved fragile and he was succeeded by the developer-dominated Richie Daley); Kirlin & Marshall, *supra* note 22, at 356 (conflicts over redistribution are seen by some as a crisis in governance and by others as insufficient to force change); Walton, *supra* note 16, at 131 (as in the Third World, urban protests increasingly involve the "conditions of collective consumption — transportation, urban services, housing . . . health, and education"). Harvey Molotch offers a plausible diagnosis:

It takes time for grievances to accumulate and find modes of effective expression. Capital moves faster [since it is already tightly organized] than culture and more rapidly than victims of change can organize for reform. . . . In the United States, without a strong left tradition, reform is always ad hoc and operates through social movements rather than party. As change upsets former arrangements for exacting social justice, there is no ongoing system to make certain that the new economic order is socially continuous with the old.

Molotch, *Urban Deals*, *supra* note 19, at 193 (citation omitted). Kirlin & Marshall add that a "dependence on established economic interests limits the extent to which minority political power can be translated into redistributive policies. It also subjects minority

ignored unless politicians and lawyers somehow dramatize their plight.

Theories of a distributive justice insist that political and moral precepts be considered along with the economic ones. For example, a minimal physiological integrity is often deemed a moral precondition to the bargaining over production and distribution stressed by the Chicago School in its Coase Theorem.¹⁵² Without such integrity, bargains will automatically favor the rich and powerful, and the autonomy assumed by Chicagoans to be in everyone's possession will never develop for the poor. The history of intergroup relations is ignored by the Chicago School. Robin Malloy notes that Chicagoans' "wealth maximization discourse can ignore the issue of whether African-Americans or Hispanics, for instance, have anything to exchange in the marketplace," or whether they "have been systematically deprived of an opportunity to acquire the wealth [and dignity] necessary to bargain voluntarily."¹⁵³

Fortunately, Malloy's classical liberalism contains "the egalitarian principle that individuals are not doormats and that there is a personal autonomy beyond which no outsider or state should be allowed to penetrate coercively."¹⁵⁴ This principle cannot be derived from the "institutional frameworks of the past," as the common law and marketplace orientations of the Chicago School would require, where these "frameworks are from the start biased against women and minorities."¹⁵⁵ In practical terms, Malloy's principle imposes a duty on governments to provide food, shelter, medical care, and education for people who do not have the purchasing power to obtain these necessities through private markets.¹⁵⁶ This principle and duty can be squared with the neoclassical economics of the Chicago School only if one accepts Gerald Meier's morally defensible view that "[p]er capita real income is only a partial index of economic welfare [or wealth maximization] because a judgment regarding economic welfare will also involve a value judgment on the desirability of a particular distribution of income."¹⁵⁷ Malloy thus comes

officials to criticism from minority groups." Kirlin & Marshall, *supra* note 22, at 359. Judges are seldom of any help. See, e.g., Mandelker, *supra* note 25, at 16 (discussing *Meierhenry v. City of Huron*, 354 N.W.2d 171 (S.D. 1984), in which the court held that the state constitution's uniformity of taxation clause applied to the property tax levy rather than to the distribution of revenues from the property tax).

152. See Coase, *supra* note 77.

153. MALLOY, SERFDOM, *supra* note 8, at 70. See WILSON, *supra* note 30, at 10-11, 146 ("long periods of racial oppression can result in a system of inequality that may persist for indefinite periods of time even after racial barriers are removed").

154. MALLOY, SERFDOM, *supra* note 8, at 50.

155. *Id.* at 51.

156. *Id.* at 80. See *id.* at 77 (discussing the libertarian philosophy of government's legitimate role).

157. Meier, *supra* note 147, at 5, 8.

close to rejecting the wealth maximization goal of neoclassical economics and to adopting instead the goal of the developmental economists, "the improvement in human well-being."¹⁵⁸

Malloy's classical liberalism is thoughtful and humane, but we can go beyond it if we *choose* to do so. The mixed economy of private and public sectors has its counterpart in a mixed polity of liberal democratic and social democratic tendencies. (More than a little authoritarianism runs through both tendencies, especially into the ghettos.) An evenhanded analysis of these often rival tendencies would illustrate that "[t]he trade-off between efficiency and equity [or between liberty and equality] need not be as severe as it currently seems to be,"¹⁵⁹ at least for the Chicago School. The social democratic tendency involves a more collective pursuit of human dignity than Malloy seems comfortable with, perhaps as an implementation of Frank Michelman's moral precept that "civilized people should not sacrifice the well-being of identifiable individuals for the benefit of the majority,"¹⁶⁰ regardless of whether markets dictate such an outcome. A redistribution from the less basic needs of the affluent to the more basic needs of the poor could be accomplished through a system of "Pigouvian taxes"¹⁶¹ which would redistribute the economic rents obtained through zoning, redevelopment projects, and the other bounties flowing from a special interest politics. Some of the benefits from this redistribution would flow back to the temporary losers, through a hydraulic "trickle up" from the poor that seems more plausible than a trickle down, and the dominance of politics by special interests would be eroded by a reluctance to pay large bribes for privileges which would be heavily taxed.

158. HARRISON, *supra* note 2, at 1.

159. FISCHEL, *supra* note 17, at 336. See ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975). But see MALLOY, *SERFDOM*, *supra* note 8, at 20 (if you have it, private capital creates a power base for the individual to challenge and constrain the state, especially from within a special interest group) and at 63 (attempts to validate collective values dehumanize by substituting the community for a differentiation among individuals); Kirlin & Marshall, *supra* note 22, at 369 (different governmental institutions may have different roles: a service-delivering bureaucracy may easily meet equity criteria by treating like cases alike, while a public entrepreneurship is more particularistic and perhaps more efficient, corrupt, or both).

160. FISCHEL, *supra* note 17, at 151. See *Declaration of Principles*, *supra* note 6, at 348 (human dignity is a basic right to shape policies and programs affecting one's life).

161. Under Pigouvian taxes, "activities that confer negative effects on others ought to be taxed and activities that confer positive effects on others ought to be subsidized." Dahlman, *supra* note 76, at 229. This is a better solution than a discrete, nonmarginal market intervention like zoning, because these taxes are calculated on the margin and thus alter incentives *within* the relevant markets. *Id.*

Once again, this scheme must be federalized to prevent the aggrieved from opportunistically switching communities or crying foul under the Interstate Commerce Clause. The rich would then have no constitutional or moral right to keep all of the economic rents they obtained from the special interest porkbarrel, but the Chicago School would give them such a right in economics: everyone is entitled to keep whatever they can get as a consequence of their absolutist "property" rights. A theory of distributive justice must ultimately flow from a theory of rights, perhaps less from Locke's or Hobbes's theory than from the second-best theory that we must all somehow live with governments and their institutions, at least until we can make some inevitably marginal changes. (Revolution is decidedly not wealth-maximizing.) Suffice it to say that, contra the Chicago School, private property rights will always be restricted in some ways; therefore, the key constitutional question is: Which impediments have been imposed and how are they enforced? Since the New Deal, it has been broadly recognized that private property rights are stumbling blocks to, as well as foundations for, freedom. The property rights of a few can stand in the way of those who have none, who have been denied reasonable opportunities for acquiring some, and who thus have an undemocratic power exercised over them. Many wealth-maximizing outcomes are possible, so the ones that occur will depend in part upon which rights and processes are chosen democratically. The conservatives' fear is that, once begun, there will be no end to redistribution.¹⁶² Yet, politics and the Constitution would impose fairly definite limits on redistribution, as they have in the past.

Urban property rights have little value apart from their proximity to a similarly valued property. The organization of urban space by special interest groups thus amounts to organizing an inequality through

162. *Id.* at 254; HARVEY, *supra* note 2, at 115; Pilon, *supra* note 84, at 372-73, 377-78, 383-84; Rubinfield, *supra* note 48, at 7. See HARVEY, *supra* note 2, at 89 ("local public services bid fair to become the chief means of income redistribution") (quoting W.R. THOMPSON, A PREFACE TO URBAN ECONOMICS 118 (1965)) and at 112 (capital flows bear little relation to need, and it is impossible to cure this defect by capitalist means); MALLOY, SERFDOM, *supra* note 8, at 71 (disagreements between liberals and conservatives in law and economics are usually played out over private property) and at 79-80 ("The requirements of human dignity mean that we cannot legitimize the tragedies and hardships of individuals by cloaking them in the language of protecting private property rights or of following the natural consequences of a market process that should be protected for its own sake." The state must serve as an "appropriate counterbalance to private coercion."). Ellickson offers some examples: taxes on new house construction are inefficient or inequitable only "when they fall partially on consumers, or on landowners who have not received zoning windfalls." (These tax revenues *could* then be used to benefit the poor.) Ellickson, *supra* note 77, at 155. However, an inclusionary zoning achieves little distributive justice because the developer will serve the wealthiest portion of the eligible group, to the extent that the developer can control the identity of the occupants. *Id.* at 156.

the vehicle of private and quasi-public property rights and to protecting the group's "turf" thereafter. Distributive justice would involve organizing a set of spatial structures that maximize equity along with efficiency. Once a sensible framework for bargaining between communities is thus established, once political market failures are curbed, in other words, the "free play of market forces" could also be distributively just.¹⁶³ Once again, this is a *Baker v. Carr* and a *Carolene Products* writ large.¹⁶⁴

Inequality is a conspicuous market failure by definition, if equality is a goal we want to pursue through markets. Even as we quarrel over the finer points of symptoms and solutions, people are almost uniformly scandalized by the injustice of governments that do little or nothing to ameliorate preventable miseries. Yet, equality is a value missing from much of the conventional economic and legal analyses and from most attempts at urban development. Liberty, on the other hand, is conventionally defined as encompassing some property rights, most notably the extensive and near-absolute property rights found in Chicago School definitions. The unresolved tensions between a variously defined liberty and equality drive our "higher" or constitutional politics.¹⁶⁵ This dilemma of liberty versus equality can be resolved only through development, a genuine upward movement of the whole society, with fairly rapid reductions in the numbers of people in the most disadvantaged categories (rather than a delusive "trickle down"). Some liberties can then be created or reinforced programmatically, even as new equalizations are attained, in a "planning for freedom" rather than for Malloy's serfdom.

163. HARVEY, *supra* note 2, at 117. See *id.* at 93 ("the poor need neighborhood government to secure the liberty to achieve prosperity") (quoting M. KOTLER, *NEIGHBORHOOD GOVERNMENT: THE LOCAL FOUNDATIONS OF POLITICAL LIFE* 71 (1969)). High negotiation costs with other communities necessitate a series of uneasy compromises, so that "we do not lose more in 'x-efficiency' than we gain in economic efficiency." *Id.* Harvey's analysis builds to a Rawlsian "sense of territorial social justice":

1. The distribution of income should be such that (a) the needs of the population within each territory are met, (b) resources are so allocated to maximize interterritorial multiplier effects, and (c) extra resources are allocated to help overcome special difficulties stemming from the physical and social environment.
2. The mechanisms (institutional, organizational, political and economic) should be such that the prospects of the least advantaged territory are as great as they possibly can be.

Id. at 116-17.

164. See *supra* notes 139-41 and accompanying text.

165. See Pilon, *supra* note 84, at 372-73 (our "antimony" between private property rights and "people rights" is a radical departure from, rather than a refinement of, Enlightenment theories); *id.* at 377 (that "the free society is not a society of equal freedom, defined as power — is precisely the rub that gives rise to the new theory of property"); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984).

Equalization is a viable goal of development and distributive justice because it subjects equality to the constraint of minimizing the loss of liberties, liberties that are defined to exclude the more extreme, Chicago School blandishments concerning property rights. A rough balance between liberty and equality can be attained through an almost dialectical process of fitting rights together in different configurations over time, rather than by allowing a liberty defined by the Chicago School to prevail every time. The Achilles' Heel of the Chicago School is the lack of justification for, or legitimation¹⁶⁶ of, the outcomes it prescribes, "unless the internal logic of the market economy itself is regarded as a form of justification."¹⁶⁷ This "internal logic" is powerful and persuasive, but does it justify the existence of the ghettos? If not, we may want to devise more compelling justifications. Our familiarity with value inquiries could make lawyers into effective ideologists for development and distributive justice, a role which is perhaps necessary because many ideologists have opposing viewpoints. At the least, we should subject these opposing viewpoints to an analytical strict scrutiny. This would be less a deconstruction than an opportunity for rival theories to self-destruct, once their analytical underpinnings and overreachings are made more apparent.

C. Enter Robin Malloy

Ronald Dworkin says something which sounds better coming from Malloy: "If [the reader] leaves my argument early, at some crucial abstract stage, then I have largely failed for him. If he leaves it late, in some matter of relative detail, then I have largely succeeded. I have failed entirely, however, if he never leaves my argument at all."¹⁶⁸ I

166. See BRUYN, *supra* note 5, at 65 ("I see a trend toward a matching of opposing traits: competition with cooperation, profit with non-profit, command with mutual governance, maximizing with optimizing profits, self-interest with public interest, financial standards with ethical standards"); *id.* at 325 (criteria of effectiveness and legitimacy will be added to market evaluations in the future); MALLOY, SERFDOM, *supra* note 8, at 11 ("Structural changes in legal economic discourse reveal inconsistencies between surviving forms of free market rhetoric and dramatic ideological shifts in foundational social norms.") and at 75 ("Rules . . . are socially chosen criteria for legitimizing socially biased arrangements."); Cummings, *supra* note 22, at 7 (the capitalist state fulfills two contradictory functions, accumulation and legitimacy; the state loses legitimacy if it helps one class at the expense of another, while the sources of its power dry up if accumulation is neglected); Fainstein & Fainstein, *supra* note 76, at 11-12. For the Chicago School, equalization is not worth pursuing precisely because it is not a zero-sum game, yet the poor need not lose before the affluent can win. Moreover, the means of pursuing equalization promise independent benefits, such as improved planning, coordination, implementation, and accountability.

167. HARVEY, *supra* note 2, at 115.

168. RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986).

left Malloy later and with more regret than I leave Dworkin, despite my greater agreement with Dworkin ideologically. Malloy's thoughtful arguments move from the general theory of law and economics to the specifics of downtown development, while my commentary considers what the specifics of ghetto miseries have to say about the general theory. I deliberately chose the limiting case of the ghetto, as one of the few exceptions that perhaps prove the "rules" of Malloy's classical liberalism. My analyses thus seem to exaggerate our disagreement. His framework is more sensible and humane than any that currently plays in America, and it deserves our enthusiasm and support.

Like Malloy, I seek the best balance attainable in the uses of private and public wealth and power. Seeing more market failures and fewer apt marketplace analogies than Malloy, I come out in favor of more state power. Ideally, my governmental power would be more centralized than Malloy's, but it would also be fairly tightly constrained by the Constitution and the goals it pursues, such as a genuine urban development. Although I cannot muster Malloy's enthusiasm for the ideas of Friedrich Hayek and Milton Friedman, who seem to mix conservatism and libertarianism with their liberalism, Malloy properly draws his central inspiration from Adam Smith. When Smith described governments as meddlesome culprits, it was mercantilist governments he had in mind, rather than the social democracies and welfare states that developed more than a century after he wrote.¹⁶⁹

Like J.S. Mill, Jeremy Bentham, and the Physiocrats, Adam Smith put more politics into his political economy¹⁷⁰ than Malloy seems willing to do. Malloy tries to build a modern political economy on a foundation of neoclassical economics,¹⁷¹ an economics which seeks to expel politics,

169. MALLOY, *SERFDOM*, *supra* note 8, at 14, 17-19, 96; MCCOY, *supra* note 47, at 41-42. *But see* MALLOY, *SERFDOM*, *supra* note 8, at 16-17, 49-50, 62-63 (unlike conservatives and liberals, who quarrel over who should exercise state power and for what purposes, classical liberals seek to limit state power).

170. James Coleman calls political economy a "non-purist" and historically validated "ancient and honorable discipline" that has been eroded by the increased academic specialization that reifies artificial boundaries among social scientists studying "a single concrete whole." Coleman, *supra* note 5, at 30-31. He states that "economists have lost touch with the bold generalizations of Adam Smith, Ricardo, Malthus, and Marx about the basic growth variables. . . . Indeed, during this century economists have had sadly little to say about the 'causes of the wealth of nations.'" *Id.* at 34 (quoting Walter T. Newlyn, *The Present State of African Economic Studies*, 64 AFR. AFF. 39 (1965)).

171. Malloy finds that:

The statist tendencies of the conservative [Chicago School] approach are furthered by . . . reliance upon the outcomes they generate from the application of neoclassical economic methods to pressing social problems. It is not the neo-classical model itself, but the indeterminate and almost dogmatic manner in

philosophy, and history from a pure economic "science." This foundation works surprisingly well for the topics Malloy analyzes, but it fails with respect to ghettos. For this reason, I stressed analogies to the Third World throughout my commentary, so as to pose a developmental economics as a better response to the plight of the poor and powerless. As lawyers, we know that a single economics theory that accounts for all of the disparate phenomena of the real world has yet to be devised. We can comfortably apply one type of analysis, developmental economics, to certain problems, even though another analysis, neoclassical economics, better addresses other problems. Rather than feel compelled to enforce a theoretical purity, we can treat economics as a plumber treats her bag of tools. We can also put up with the messiness of the theoretical and policy compromises that will result.

This is not the place fully to rehearse the arguments, but most theories of developmental economics have a built-in emphasis on a distributive justice, especially with regard to the unmet basic needs of the poor and powerless. These theories attempt to minimize the opportunities for falling to or below subsistence, chiefly by upgrading people's productive capacities as a means of maximizing wealth. The circumstances of a particular underdevelopment (even in the midst of an American abundance) usually stem from outcomes created and distributed in the past, outcomes that also create the current constraints on elites dealing with each other and with the poor and powerless. The patterns or terms of trade formed by these interdependent outcomes and constraints often displace markets and can be fundamentally changed through development: a nation-building in America and, with regard to race relations and our urban infrastructures, a national reconstruction.¹⁷²

which Posnerian conservatives employ the model as an end in itself, which causes problems for people concerned with individual liberty. . . . The real attack on the neoclassical model, as used by Posner . . . centers on the question of the values incorporated into it apart from any discussion of its realistic or predictive qualities.

MALLOY, SERFDOM, *supra* note 8, at 66. See also Harvey, *supra* note 2, at 96 ("It is not normative modelling which is at fault but the *kind* of norms built into such models.").

172. Development can be defined as "higher standards of living, longer lives, and fewer health problems; education . . . that will increase their earning capacity and leave them more in control of their lives; a measure of stability and tranquility; and the opportunity to do things that give them pleasure and satisfaction." HARRISON, *supra* note 2, at 1. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) contains the germ (no more than that) of an idea of the development of people rather than of things: the "dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." BRUYN, *supra* note 5, at 65. See *Declaration of Principles*, *supra* note 6, at 344, 347-48; MEIER, *supra* note 147 *passim*; PORTER, *supra* note 4, at 560; Coleman, *supra* note 5, at 33 (mainstream economics has not promoted development because it does not seek to create the institutions conducive to development).

Robin Malloy's focus on urban land use, obviously worthy in and of itself, misses the point from a developmental perspective, both for the ghettos and for multinational investors. The poor have almost no access to land uses capable of earning economic rents, and it is doubtful that such an access is the most cost-effective way of reducing poverty. Multinational investors are not primarily interested in such access because their flexible strategies usually avoid tying up large chunks of capital in immovable assets for long periods of time. Some of Malloy's policy recommendations for urban development echo those of the import-substitution strategy that was discredited in developmental economics a decade ago.¹⁷³ Import substitution often leads to excess capacity, because producers in other cities lose some of their "export" markets, and to new assembly or unpackaging operations with little local value added. These operations seldom develop a competitive advantage because they are almost always one or more technological generations behind the leaders and they usually need continued subsidies ("tariffs") to compete for local consumers. (Are the Indianapolis Colts an import-substitution policy gone astray?)

The popular strategy of a local government bribing a producer to locate or remain in its city amounts to subsidizing local jobs today, so that the city can continue to subsidize them tomorrow. Most of the producers that actively court this strategy are at the low cost end of the relevant market, and these producers appeal to the most price sensitive consumers. (Consider Sears's attempt to coerce Chicago over remaining in the city and Chicago's subsequent bribe that failed.) Such producers lag behind the quality and performance leaders who will dominate markets in the future and who have a substantial "export" potential. A better strategy is an urban policy which bets on productive new *clusters* of mutually-supporting goods and services. Silicon Valley and the North Carolina Research Triangle are ideas already used up, but other good ideas remain to be implemented.¹⁷⁴ Governmental stimuli would largely take the form of signalling the opportunities and investing in the appropriate infrastructures, research, and education.¹⁷⁵ Superb universities

173. MALLOY, *SERFDOM*, *supra* note 8, at 121. Malloy places central reliance on Jane Jacobs, *Cities and the Wealth of Nations: Principles of Economic Life* (1984) and Israel M. Kirzner, *Discovery and the Capitalist Process* (1985). A much more useful source is arguably Michael E. Porter's book, which was presumably unavailable to Malloy while he was preparing his manuscript. See PORTER, *supra* note 4.

174. PORTER, *supra* note 4, at 655-56.

175. See *id. passim*; Kantor, *supra* note 19, at 511 (we must stimulate the conversion of municipal economies to fit their new, more specialized functions by changing patterns of land use, housing, and employment). Porter makes much of government helping to fill in *some* of the elements in the "diamond" of mutually dependent factors that are

serve as magnets for the clusters worth having, and assuring access to universities for the poor would require the substantial upgrading of city schools that would pay other dividends as well. An explicit, federalized urban policy is needed, one akin to the industrial policy that most economically successful countries use to good effect. We already have an urban and industrial policy, in which deference is given to those who pay the biggest bribes in a special interest politics, so there would be little loss of liberty in making these policies more beneficial to the country.

The federal government must assume a large role because ghetto problems require macroeconomic solutions.¹⁷⁶ No amount of programs which operate at the individual level can match the effects of tight labor markets (a relatively full employment) in overcoming ghetto miseries. (Even the best of job training programs will fail if there are no jobs.) Out of self-interest, employers would be forced to abandon their racism and the skill and educational qualifications for jobs that do not require them to attract employees they need. With skills and some seniority, minority workers would no longer be an easily abused "underlayer of cheap labor," a last hired, first fired buffer for "white" workers.¹⁷⁷ The price of full employment policies *might* be some inflation, but probably less than imagined and hardly any if the sectoral inflation of defense budgets and other porkbarrels can be brought under control. Although these policies may make sense from an eclectic, problem-oriented perspective, they are beyond the pale for neoclassical economics and the neoconservative politics it influences.

conductive to a competitive advantage: company strategy, structure, and rivalry; factor of production conditions; demand conditions; and related and supporting industries. PORTER, *supra* note 4, at 127. Higher education is a significant force for integration within the diamond. Education equalizes opportunities, reduces labor market fragmentations and the economic rents that the owners of scarce skills can command, improves the ability of a "human capital" to create other resources, and otherwise helps to sustain competitive advantages.

176. Malloy's only reference to macroeconomic concerns that I could find occurs in the context of microeconomic discussions of rent control in New York City: "[W]e all eventually end up paying for misguided policies, by way of inflation, unemployment, increased taxes, or the financial consequences of a large national deficit." MALLOY, SERFDOM, *supra* note 8, at 57.

177. HEILBRONER & SINGER, *supra* note 1, at 155; ROSSI, *supra* note 2, at 200. See Wilson, *supra* note 30, at 16 (affirmative action increases demand for what are perceived as "qualified" minorities but decreases demand for the less qualified, due to increased costs and welfare programs that reduce self-reliance) and at 121 ("rational government involvement in the economy" is needed — "wage and price stability, favorable employment conditions, and the development and integration of manpower training programs with educational programs.") and at 128 (despite antidiscrimination legislation and affirmative action, things have gotten worse).

A sensible macroeconomics will apparently not be forthcoming for awhile, so what can cities do in the meantime? Briefly, they must seek to change constraints (attempt development) as well as adjust to them. Cities must curb their special interest politics that distract and dissipate public and private resources before they can rationalize their systems of incentives and disincentives. As much as possible should be done through the most efficient taxes and expenditures, especially by creatively appropriating some of the currently untapped "surplus" from an explosive service economy.¹⁷⁸ The most inefficient of in-kind redistributions should be avoided, although a few strategic interventions like education and housing integration are essential to a long-term efficiency. Credit unions and consumers' and employees' cooperatives should be promoted as a means of integrating ghetto economies into the mainstream. Finally, the welfare system must be improved as the means of meeting immediate and serious need. These programs would cost substantially less than the savings and loan bailout, to say nothing of other welfare programs for the relatively affluent.¹⁷⁹

IV. CONCLUSION

Drew McCoy writes that, in the 1790s,

republican America was to be characterized by an unprecedented degree of social equality, whereby even the poorest man would at least be secure, economically competent, and independent. Indeed, the United States was to be a revolutionary society precisely because it would not have the permanent classes of privileged rich and dependent poor that Americans associated with the "old" societies of mercantilist Europe.¹⁸⁰

178. Clavel & Kleniewski, *supra* note 5, at 209.

179. See CHRISTOPHER GUNN & HAZEL D. GUNN, *RECLAIMING CAPITAL: DEMOCRATIC INITIATIVES AND COMMUNITY DEVELOPMENT* (1991); Dahlman, *supra* note 76, at 229; Ellickson, *supra* note 77, at 155-56, 176; Molotch, *Urban Deals*, *supra* note 19, at 180. See also Rossi, *supra* note 2, at 204, 207-08 (holes in the social welfare net are typically those that attract little sympathy from the legislature or the public, such as mental illness); Clavel & Kleniewski, *supra* note 5, at 221 ("the space for local policy is greater than it was," and "local governments have more maneuvering space than is commonly assumed").

180. McCoy, *supra* note 47, at 237. See *id.* at 185-86 (Jeffersonians said that 1800 was the substance of that which 1776 was the form, a move away from the English "court" model. Jeffersonians nevertheless felt that it was unsafe to dismantle Hamilton's system, and they sought to control its pernicious effects instead.). But see APPLEBY, *supra* note 63, at 14-15 (classical republican virtue enabled "men to rise above private interests in order to act for the good of the whole," yet by the end of the 18th century, this virtue came to mean the exact opposite — the capacity to look out for oneself) and at 23 (Jeffersonians were influenced by Tom Paine's *Common Sense*, in which society, and

Our revolutionary enthusiasms have faded, and two centuries of an American economic growth that outstripped our development, and of bigotry and an inattention to distributive justice, have left us with more of the permanently "dependent poor" than are found in the successors to the "old" European societies we once scorned.

Robin Malloy illustrates how ideologically colored interpretations of this economic history are both possible and likely. The hard fact remains, however, that the ghettos (where the "dependent poor" are concentrated) are a drag on, and a reproach to, the rest of the economy and the Chicago School of law and economics. A cost-benefit analysis, using methods that Chicagoans would approve but on a longer time horizon than they would likely countenance, would show that this state of affairs cannot long continue. We spend fantastic sums to police the crime and despair of ghettos, and almost nothing to integrate markets and to enhance productivity. If we think about it, we may indeed want to be a "throw-away society" with regard to people as well as soft drink containers. Science fiction writers are fond of projecting the consequences of such behavior into the grim, Arnold Schwarzeneggerean future that awaits us. Theirs is not the kind of evidence we would accept as probative, but we act daily to increase the risk that these projections will be proved correct.

All is not lost, of course. Law is more than a mouse under the chairs of markets or under a land use porkbarrel. As lawyers, we can refocus the perspective on complex and interrelated problems and generate clear political choices. We should aim at a genuine institutional pluralism, a diversification of risks and opportunities that creates more viable niches for the poor. Institutions and processes must be reformed to make them more conducive to development. Markets must play an important, but not an overweening, role. Solutions must be moderate enough to command a consensus, but they will nevertheless involve tough moral choices about distributing scarce resources.¹⁸¹ William Fischel could be describing lawyers when he wrote that "economists should be modest in the application of their trade. Using their tools of analysis to create a deterministic analysis of society seems dangerous and wrongheaded."¹⁸² Cities

presumably markets, are "produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices.") (quoting *THE COMPLETE WRITINGS OF THOMAS PAINE* 4 (Phillip S. Fonored ed., 1945)); McCoy, *supra* note 47, at 134 (Hamilton accepted the inevitability of "social inequality, propertyless dependence, and virtually unbridled avarice").

181. See HARRINGTON, *supra* note 1, at 145, 170; HARVEY, *supra* note 2, at 117-18; WILSON, *supra* note 30, at 18, 30.

182. FISCHEL, *supra* note 17, at 122. This quote continues: "To tell people, for example, that pollution [or poverty] is not a problem because private transactions might

are said to be “monuments to the possibilities of civilized cooperation,”¹⁸³ and we can hope that cooperation will extend to the efforts of politicians and social scientists who seek to solve city problems. Robin Malloy gives us an excellent start on this road, but the journey is likely to be long and circuitous.

have handled it would be the epitome of presumptuousness.” Economics should (but rarely does) provide “a basis for suggesting alternative means of accomplishing social objectives.” *Id.* See *supra* note 170.

183. Berger & Blomquist, *supra* note 15, at 67. See Coleman, *supra* note 5, at 32 (an intensive exposure to Third World realities strengthens a “macropolitical (nation-building) and holistic perspective”). The same thing arguably occurs when people are exposed to America’s Third World — the slums.

Resisting Serfdom: Making the Market Work in a Great Republic

CHRISTIAN C. DAY*

“No man’s life, liberty, or property are safe while the legislature is in session.”

Anonymous¹

“[T]he knowne certaintie of the law is the safetie of all.”

Sir Edward Coke²

“[T]he vigor of government is essential to the security of liberty.”

Alexander Hamilton³

INTRODUCTION

This discussion endorses Professor Malloy’s call for classical liberal economics and politics to reverse the drift toward statism and communitarianism. Malloy’s preference for market economies and his observations on cities, subsidies, and economic activity are sound.

Malloy has been too harsh on the development policies of cities, however. Land use and transportation policies, among other governmental actions, have tilted the playing field, handicapped the urban players, and crippled urban economics. Urban America’s counterattack, in light of past economic and racial segregation, has some moral appeal,

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1. Anonymous, *quoted in* The Final Accounting in the Estate of A.B., 1 Tucker 247, 249 (N.Y. Surr. 1866).

2. SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, Epilogus, last paragraph, at 395.a (facsimile of 1823 printed for the Legal Classics Library). For many years when I taught at The Wharton School, I would note this famous aphorism by Coke which ennobled the law school at Pennsylvania. It was inscribed in marble at the top of the Rotunda staircase which served as the portal to the Biddle Law Library. I always considered it ironic because in Coke’s times society at least pretended to be rooted in general rules of law. Modern society, as Professor Malloy has pointed out, seems hellbent on abandoning the concept of general rules. Coke and Aquinas would be dumbstruck at our special legislation.

3. THE FEDERALIST No. 1, at 35 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST No. 1].

but the subsidies and politics which sustain it are economically and morally bankrupt. The trick is to stimulate economic growth, intervene when appropriate (health care and education, for example), and sustain the common good in a hostile and unforgiving world without losing sight of the moral objectives of liberty and order. This critique concludes that a revitalized Hamiltonian and Federalist vision embracing a market economy offers the best hope of fulfilling the American promise.

The winds of change are upon the world. The Cold War has ended. Eastern Europe is moving toward democratic institutions and market economies. The democratic movement in the Soviet Union has survived a coup. Collectivism seems to be on the run in many parts of the world. Everywhere democrats and champions of the market economy look to the United States for spiritual guidance and practical knowledge. Ironically, economic and political freedom in the United States may be drifting toward a statist society. Twentieth Century America's attempts to confront the challenges of a post-industrial society may, through good intentions and unconscionable political manipulation, plan many of our liberties right out of existence. That is the threat to our liberties and moral dignity as seen by Professor Robin Malloy.

*Planning for Serfdom: Legal Economic Discourse and Downtown Development*⁴ is a clarion call for Americans to return to classical liberalism to preserve our economic and political freedom. Professor Malloy opens a debate and calls into question the nation's dangerous slide toward a statist-communitarian society.⁵ Modern political and economic life has blurred countervailing centers of power. As the power of both the state and well-connected political groups grows, autonomy is undermined and is responsible for economic and political decisions which threaten to leave the nation poorer and less free. Malloy grasps,

4. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

5. At the outset, I must confess error. Some of my earlier writings on energy and land use policy, Christian C. Day, *A Land Retrenchment Policy for Energy and Resource-Short Times: A Modest Proposal*, 10 FORDHAM URB. L.J. 72 (1982), and historic preservation, Christian C. Day, *Federal Income Tax Reform: An Important Tool for Historic Preservation*, 16 WAKE FOREST L. REV. 315 (1980), and even more recent ones on corporate finance employing tax credits and other tax subsidies, Christian C. Day, *Corporate Investment in Real Estate Ventures — Special Considerations for Special Allocations Under Section 704: "The Price is Right!"*, 10 J. CORP. L. 313 (1985), may call into question the validity of the thoughts and criticisms that follow. I plead guilty of vacillation. Conformity, the hobgoblin of minds, was never my forté. Despite my past wanderings, and probably present ones too, I have always embraced the ideal of a market economy. Politically, I have wandered from Aristotle to Aquinas Burke, Blackstone, Hamilton, Marshall, and Taney. (Taney's nationalist economic ideas can be found in such cases as *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), but his views on slavery cannot).

as did Milton Friedman, that an essential connection exists between economic liberty and political liberty which, in a market economy, serves to check the encroaching power of the state or groups seeking to capture the state or the economy.⁶

Robin Malloy's fundamental concern with the drift of America toward a statist society rightly portrays the political and economic theories which are accelerating that drift. The classical liberal political and economic values he champions offer the nation a moral base from which to build a freer and more productive society. His reliance on natural rights and the market economy to liberate mankind is in accord with my political beliefs. Although I am in agreement with his general propositions and prefer his model to any of the other contemporary alternatives outlined in his book,⁷ I am concerned with how America, as the sole superpower, can continue to provide for the general welfare and common defense within the classical liberal framework.⁸ I take a more expansive, Hamiltonian view of government programs. Thus, I would have a considerably more active liberal classical government than Professor Malloy.

I second Professor Malloy's classical liberal preference for the market economy and its role in the liberation of mankind. Market theory makes the role of individuals central. Individuals are presumed to be rational and are empowered to make critical decisions. It is their hurly-burly counterbalancing power which can stimulate change and reform.⁹ Liberal economics nurtures liberty, natural rights, and human dignity. Unlike neoconservative thought, classical liberalism recognizes that earlier arrangements of power and rights may not have been fair.¹⁰ Classical

6. This is because many sources of ideas, money, labor, and goods exist in a capitalist society. People are free to unite for economic purposes to create opportunities. It is hard to predict from where the next earth-shattering idea will emerge. Invention, enterprise, and industry create many points of economic power which are difficult to cabin. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 14-21 (1962).

7. Professor Malloy refutes conservative theory, liberalism, communitarianism, and libertarianism. MALLOY, *SERFDOM*, *supra* note 4, at 61-79.

8. The major difficulty I have with Professor Malloy's book is that neither he nor Adam Smith tells us how to handle the problems of a large republic. Adam Smith's ideas seem to be more compatible with the relatively small and homogenous state — like England during the late eighteenth century — than with a continental state like the United States or the Soviet Union.

9. This is borne out when the market economies and liberal political states of the industrial West are contrasted with the planned economies of the communist world. Planned economies have failed miserably. With the passing of communism, a tremendous power vacuum now exists because self-generating political and economic structures were not permitted or nurtured under communism.

10. Neoconservatives proceed from the premise that the present status quo resulted

liberalism leaves open rearrangement based upon principled political decisions. Classical liberal thought prefers general to specific rules and prefers spontaneity to planning. Liberal economics seeks to attain a proper relationship among individuals, the state, and the community.¹¹

I. THE PREFERENCE FOR CLASSICAL LIBERALISM

Classical liberalism is founded on a strong belief in individual liberty. Individual freedom is prized, and restrictions are placed upon government power and control.¹² The natural rights championed by Malloy and other classical liberals do not embrace a laissez-faire society.¹³ To the contrary, classical liberals accept restraints on the individual only for significant social purposes.¹⁴

Justice is the protection of individuals within a society governed by general rules and principles.¹⁵ The classical liberal state attempts to treat all equally. Adam Smith and his modern followers advocate re-

from historic transactions free from injustice, prejudice, or taint. Classical liberalism recognizes that many of the present market arrangements are not fair and that the playing field is not level. Racial, ethnic, and religious discrimination have handicapped many Americans, and past injustices contributed to the present scheme of ownership and market opportunities. To overcome extant handicaps and market failures, classical liberalism permits and encourages discrete intervention in order to level the field and advance human dignity. MALLOY, *SERFDOM*, *supra* note 4, at 61-70, 79-83.

11. *Id.* at 3.

12. Classical liberalism can be distinguished from modern liberalism which calls for considerable state intervention and reliance upon planning to overcome "market" or political failures.

13. MALLOY, *SERFDOM*, *supra* note 4, at 18.

14. For example, people may be taxed to provide for the common defense, to educate the public, and to invest in other projects which cannot be produced by the market. I suspect that the scope and depth of these investments and the projects selected would be an area in which Professor Malloy, Professor Friedman, and I might disagree.

15. This requirement, as seen below, is critical. General rules promote equality and a level playing field. They promote competition in the marketplace and avoid the use of the political process to allocate resources and power to groups or individuals who have captured statehouses, the Congress, or the White House. Individuals and associations succeed or fail on their own merits, and not because they have used political power to manipulate resources and opportunities. As seen in Malloy's book, many urban development schemes (his metaphor for the present American economy and polity) rely upon closed processes and special rules where the opportunities and resources are available only to groups and individuals who have captured the political process. Once the regime of special rules is created, priorities are established and resources deployed based upon personal status and political decisions, not the operation of the impersonal market. It should not be forgotten that in the market, everyone's vote counts and many options are present. Once allocations are made along political lines, choices shrink (due to compromises and state economic self-interest), and the solutions become cruder and less responsive.

straining state power and protecting individuals from the coercive power of *both* the state and private blocs of special interests.¹⁶ The individual's natural rights of liberty, freedom, and human dignity are protected by a commitment to equality, justice, and fairness.

II. THE ROLE OF THE MARKET ECONOMY

Classical liberalism supports a market economy which gives rise to commercial activity, releases creativity, and permits the mobility of capital.¹⁷ Market frameworks permit the exchange of information and the coordination of activities.¹⁸ General rules regulate economic activity so that all participants are subject to the same restraints. General rules¹⁹ and liberal government place restraints upon the creation or changing of rules for the benefit of "privileged" individuals or groups.²⁰ This refusal to entertain special rules protects individuals from encroachment by political groups or by the state. Thus, government must be formed to protect individuals from unchecked, coercive private power,²¹ yet it must also avoid becoming a substitute for private coercion.²² In Smith's view, governments exist to protect human dignity and to provide only

16. MALLOY, SERFDOM, *supra* note 4, at 18.

17. In a market economy, all are free to compete to create or sell wares and services. The judgment of the individual is substituted for political judgment. Persons are free to pursue their selfish interests, while the market acts as a check on economic judgment. Capital is mobile as investors shift it rapidly, whenever the market dictates, thus earning the yield they desire. Historically, the creation of the merchant class enhanced personal freedom because the economic power of merchants translated into political power for themselves and their customers. Certainly by the eighteenth century, power and freedom were no longer dependent upon feudal status.

18. MALLOY, SERFDOM, *supra* note 4, at 21.

19. My preference for general rules and laws is founded upon St. Thomas Aquinas's definition of law which, if adhered to, thwarts much mischief. Law is a thing of reason, made by the community for the *common good* and promulgated. THE POCKET AQUINAS 254-255 (Vernon J. Bourke ed. & trans., 1960).

20. "Privileged" individuals or groups could be developers or their political allies, as seen in Professor Malloy's Indianapolis illustration. MALLOY, SERFDOM, *supra* note 4, at 103-12. They could also be minorities or manufacturers and industrialists who have laid political claims upon society's resources to the exclusion of others. What they all enjoy in common is their desire to have resources allocated to them on the basis of personal status, group status, or personal relationship. They are willing to use their political clout to close the market to others and enhance their economic and community strength through political means.

21. The state can also prove to be a mighty foe of freedom if it is unchecked by the private sector. Prostitution of government can promote individual or group goals precisely because it is easier to mobilize politically than to engineer a desired outcome in the autonomous marketplace. *Id.* at 35.

22. *Id.* at 25.

those goods and services that the market will not provide.²³ To accomplish these liberal goals, government must foster a market economy.

The market economy creates opportunities for sharing and increasing wealth. The capitalistic economy expands because it rewards the purveyors of products and services (which may be created by anyone with ability), rather than making allocations determined by status.²⁴ The economic liberation present in the market economy fosters political freedoms as well.²⁵ The market creates power bases which challenge and constrain the state. Capitalist society has many economic power bases beyond the control of the state which ultimately empower people.²⁶ The state facilitation of the market checks the state and prevents it from becoming too powerful. The greater the private growth and diversity, the greater the check on state power.

When government intrudes into the market and rations what individuals produce (or would produce if the government had not appropriated the resources), less wealth is created. There is more competition for scarce resources and greater pressure on the government by interest groups to capture those scarce resources. Classical liberal government avoids these political failures by creating a system of checks and balances which permits spontaneous markets and political activity.²⁷ It also retains

23. *Id.* at 26. In Smith's world, education was a public good to be provided. Education is not provided for all by the market because the market responds to the production of goods and services, not individual needs and desires. Thus, the market would appear to disenfranchise the less fortunate. Smith would answer the unmet need by having government provide for education in support of individual liberty and human dignity. *Id.* at 27. Professor Malloy suggests that modern market "failures" also include lack of housing and health care. Although I agree with Malloy in general principle, it seems that government has tried and failed to provide housing. See Howard Husock, *Lessons from Housing's Not-So-Bad Old Days*, WALL ST. J., Sept. 23, 1991, at A14. Husock makes a compelling argument that many of the housing programs and the housing reform movement have been responsible for the destruction of moderate and affordable housing, as well as the neighborhood social structure which provided a degree of safety and civility to many poorer communities.

24. This is not a call for capitalism qua capitalism. Rather, it is a recognition that the market economy, when coupled with classical liberal values, promotes freedom. See generally FRIEDMAN, *supra* note 6.

25. Adam Smith points out that the pursuit of wealth alone is not an end. The equality of the market permits the harmonizing of individual freedom with social cooperation. MALLOY, *SERFDOM*, *supra* note 4, at 22.

26. Professor Malloy correctly points out that modern urban economics and planning run counter to the classical liberal model he espouses by relying upon politics and status in the allocation of resources. See generally *id.* at 89-102. The state, as arbiter, grows stronger, as do the groups which capture the state and the political process. This aggrandizement undermines economic and political liberty.

27. The spontaneous urban economy which unleashes innovation, creates capital, and expands liberty, is vividly described in three excellent books by Jane Jacobs. JANE

a healthy skepticism of the ability of a democratic government to restrain the power of the state.²⁸

I second Professor Malloy's observations of the utilities of the competing political/economic systems and their threat to liberty and human dignity. The conscious and unconscious foes of classical liberty are at work, and their doctrines have been accepted by many.²⁹ Oddly, many political leaders are eroding liberties in the name of some social values such as income redistribution and preservation of the status quo.

Professor Malloy's attack on the present system of cross-subsidies is valid. The system makes people politically and economically irresponsible, and it concentrates power while distorting and enfeebling the economy. Subsidies and planning of the sort Professor Malloy disdains are economically and politically dangerous.³⁰ They fail to price goods and services accurately.³¹ Without the market signals conveyed by the

JACOBS, CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE (1984) [hereinafter JACOBS, CITIES]; JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); JANE JACOBS, THE ECONOMY OF CITIES (1969).

28. MALLOY, SERFDOM, *supra* note 4, at 30.

29. Liberalism, neoconservatism, communitarianism, and critical legal studies all offer competing models for legal and economic thought, and all, as illustrated by Professor Malloy, have shortcomings which undermine political and economic freedom. *Id.* at 61-76.

30. Professor Malloy is no friend of many modern zoning developments and land use controls such as planned unit developments, inclusionary zoning, special assessment districts, and tax increment financing. I am in accord with his view that these complicated devices are often used to benefit certain developers and other political favorites. At a minimum, special considerations are awarded and barriers are erected which enhance the advantages of some members in the community or communities at the expense of others. This improper allocation of community resources concentrates power, blurs the line between public and private entities, and weakens potential economic and political competitors who have been excluded from the process. However, I am not as sanguine regarding zoning and general rules applied to development as Professor Malloy. On a theoretical level, I would hope that he is correct. However, even traditional zoning (which he touts as a kind of paradigm), may not produce the benefits of the fair play and competition he anticipates. *See infra* notes 45-51 and accompanying text.

31. With direct subsidies, voters and their representatives can at least appreciate what a particular program might cost and make an intelligent decision. Thus, if Congress votes to give Syracuse, New York a grant of \$8 million for a new science center, Alabamians can see some of their tax dollars flocking North and protest the pork barrel. Alabamians and their allies might monitor the project to verify its utility. Alternatively, they might demand similar projects for themselves which they are unwilling or unable to fund locally.

Tax expenditures are more difficult to track and check. If New Yorkers were to use investment tax credits or charitable deductions to build a science center and museum, the lost revenue would have to come from someone else's pocket. Yet, as Professor Malloy points out, it is difficult at present to trace the fiscal and economic damage to the "culprits." For example, New York City, Indianapolis, and low-income housing

price mechanism, intelligent and rational allocations are harder for individuals and society to make.³² Consequently, scarce resources are misused and opportunities are lost.

This misapplication and distortion is not without benefits for those involved in politics.³³ As Professor Malloy points out, many profit from public-private partnerships and public entrepreneurship. Developers,

syndicators and investors all profit from hard to trace subsidies. New York profits from rent control which makes greater public housing investment necessary and requires state and federal tax dollars to accomplish its goal. Indianapolis profits from the tax dollars sent and forgiven to spur its renaissance. Furthermore, those who have produced syndicated low-income housing have tax subsidies which dramatically benefit the wealthy and are considerably less efficient than direct payments such as vouchers. These kinds of tax expenditures are politically popular. They inure to the well-heeled and well-organized. They are hard to trace and evaluate, and they benefit those with political savvy and power.

The general population and the truly disadvantaged have little effective claim on resource allocations except when they participate in pork barrel projects and logrolling. This type of horse-trading is politically acceptable and a time honored method of doing business. It may produce some horizontal equity. That is, Alabama may get an unnecessary dam and New Yorkers may get some federally assisted public housing. This pork barrel sharing does not address the vertical equity issues. Those of wealth and power seem to enjoy the lion's share of largess. For example, witness the value of the tax benefits given to wealthy investors in low-income housing prior to the Tax Reform Act of 1986. It also does not confront the squandering of resources and the actual needs and value of the projects when political power determines public and private investment.

32. Sometimes the subsidies produce dramatic and serendipitous consequences. The Pacific Northwest was the beneficiary of massive investments in hydroelectric power which subsidized the land reclamation projects of the New Deal. Inexpensive power facilitated the irrigation of the semi-arid sections of Washington and Oregon. The abundance of hydroelectric power was a godsend during World War II. Inexpensive electricity powered the aluminum and aircraft industries which were so instrumental in defeating the Axis powers. The cost of World War II to the nation and the world would have been dearer without America's ability to gear up in the Northwest. MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 168-70 (1986). Notwithstanding the indisputable value of the subsidized works in this example, America's system of pork barrel subsidies threatens much of what we as a nation profess to cherish.

33. The morality of the taking of property from some persons (the right to develop one's land) and giving it to others to build a shopping center or hotel is rarely part of the present political argument. This issue has been settled constitutionally in favor of the state and the idea of public entrepreneurship in such cases as *Berman v. Parker*, 348 U.S. 26 (1954) (condemnation of department store in urban renewal area sustained as valid use of police power within purview of public purpose) and *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 190 N.E.2d 402 (N.Y.), *appeal dismissed*, 375 U.S. 78 (1963) (sandwich shop taken for construction of World Trade Center). Nevertheless, it is appropriate to consider and debate the ramifications of the doctrine of "public purpose" which sustains many of these intrusions. Although many projects initiated under the guise of having a "public use" or a "public purpose" may be constitutional, many may be economically unwise and morally suspect.

bankers, national politicians, civic leaders, and handmaidens such as lawyers, architects, real estate professionals, and unions may profit from the public/private realignment in urban redevelopment. These special interests and their allies have gained scarce resources³⁴ and grown politically powerful at the expense of other cities with less clout, emerging areas, and even the suburbs.³⁵ This perversion of the economy and the political process is cancerous because illegitimate growth weakens rivals, concentrates power, and undermines competing regions and economic ventures.

III. CITIES, ECONOMIC GROWTH, AND SUBSIDIES

Many cities and regions have pursued a "beggar thy neighbor" policy in an attempt to attract and retain industry and capital. On a local level, cities and counties have used tax forgiveness, grants, and industrial revenue bonds to attract new industry and investment. On a regional level, the Tennessee Valley Authority (TVA) and the federal water and reclamation policies strive to achieve the same result. Professor Malloy's analysis of the failure of urban development schemes demonstrates that present urban policies have been politically dangerous and have failed to expand the market and capital base.

Both the liberal programs of the New Deal and the conservative programs of Nixon's New Federalism failed to produce their economic

34. The cities studied by Professor Malloy illustrate many of the problems present in our political world. A broader-based political issue is water management in the American West, where cross-subsidies and political alignments threaten to yield a devastating harvest. For almost a century, federal and western state water and land management policies have promoted abundant and inexpensive water for much of the nation west of the 100th meridian. This land had been desert or semi-desert for eons, yet the Bureau of Reclamation, the Corps of Engineers, and state water management programs have fostered great development by providing cheap, subsidized water. Agribusiness, powerful corporations, cities such as Los Angeles and Denver, and plain folks formed a powerful alliance with the dam builders and the Congress. The result has been unprecedented growth in the West and Southwest at the expense of the environment and the American public. The water lobby is so powerful that it has taken Herculean efforts to stop the most obviously worthless projects. Congress, because of the power of certain legislators and their supporters, seems to be unable to curb the fiscal and environmental abuses. This unpleasant, yet fascinating tale, is told in the absorbing *Cadillac Desert*. REISNER, *supra* note 32.

35. I have less sympathy for the suburbs in many cases because suburban communities throughout the nation have used zoning to fend off undesirable racial groups and less advantaged persons. Despite a generation of "inclusive zoning" and landmark cases designed to open the suburbs to the poor and minorities, few are open to a degree that is fair or just. Furthermore, suburban communities are not without shame. They, too, have used planned developments for preferred suburban residential development and tax incentives to lure urban, out-of-state, and foreign businesses. Notwithstanding the imperfections everywhere, Professor Malloy's concern about the economic and political distortions are valid.

development and revitalization goals because both schemes sought to allocate scarce resources politically. Neither produced a change in the relationship of the individual to the state.³⁶ Special interest groups with their particular access to resources were substituted, but the national government's control over the economy remained undiminished. These political attempts to create and regenerate wealth have not been successful because the subsidies which produced capital did not create import-replacing activities as evidenced by the examples below.³⁷

Cities and regions have been remarkably successful in garnering subsidies to aid "development." Without producing import-replacing industries, Appalachia remains a desperately poor region despite the magnitude of the subsidies which produced the TVA.³⁸ The TVA subsidy continues unabated because of its beneficent intent and because it is linked to the entrenched Army Corps of Engineers and the Corps' powerful allies in Congress.³⁹ Capital has been transferred from wealthier regions, yet this infusion of capital has been unable to alleviate the conditions that created the poverty.

Cities and regions occasionally attempt to spur economic development by offering tax incentives to companies that relocate and by fostering government policies which attempt to hold down labor costs. While on their face these policies do not seem like subsidies, some are in fact subsidies. Often, they also fail to generate the economic growth which was anticipated because they merely capture enterprises without unlocking their potential. Although no one would confuse the prosperous Atlanta region with Appalachia, it too, has benefited from economic policies that have "lured" runaway businesses and industries seeking cheaper labor costs and lower taxes. First came the textile industry, then the military.⁴⁰ Lockheed Aircraft spurred great development in Los Angeles during its corporate youth. Eventually, it grew so powerful and self-sufficient that it could transplant its operations to Marietta, Georgia. As a transplant industry, it did not cause tremendous growth in local Georgian industries because Lockheed was generally self-sufficient. Thus, no import-replacing boom occurred.⁴¹ Georgia was richer and Los An-

36. MALLOY, SERFDOM, *supra* note 4, at 118.

37. For a brief overview of the capital creation cycle through import-replacing activities, see *id.* at 118-21.

38. See JACOBS, CITIES, *supra* note 27, at 110-23.

39. Cf. REISNER, *supra* note 32, at 337-41.

40. Powerful members of Congress who sat on the Armed Services committees made sure that the federal government invested in their districts. Congressmen also saw to it that pork barrel water projects were located in their districts to the delight of the Corps of Engineers and dam building contractors.

41. JACOBS, CITIES, *supra* note 27, at 94-97.

geles poorer. A type of zero-sum game was played between regions without creating large increases in wealth or investment.

IV. A MODEST CASE FOR THE CITIES

A strong case has been made by Professor Malloy that our present urban planning policies have corrupted urban politics and the economy, yet he may be too hard on cities and the states. Cities may have made the best deal possible given the climate of the twentieth century, their historic status as wards of the state, and the errors of liberal politics.⁴² Cities have not been in control of their futures. Jeffersonian, anti-urban bias has been present from the inception of the federal state. Racial discrimination and conflict, crime, poor schools, pollution, and poverty have crippled older cities and regions seeking to revitalize and compete. Federal dollars were drawn from the Northeast and Midwest for military installations in the South and for land reclamation projects in the arid and semi-desert West.⁴³ These dollars subsidized, and continue to subsidize, new cities and suburban development in those "growth" regions.

The New Federalism under President Nixon illustrates this phenomenon. Block grants replaced earlier line item subsidies for urban development projects. Although block grants gave cities greater freedom of action, they also shifted funds to the conservative, Republican, urban and suburban communities that supported the President. These subsidies

42. "American cities today do not have the power to solve their current problems or to control their future development. . . . Under current law, cities have no 'natural' or 'inherent' power to do anything simply because they decide to do it. Cities have only those powers delegated to them by state government. . . ." Gerald E. Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980). Other scholars have also found the city powerless. See Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 370 (1985) (citing CHARLES RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* 50-51, 69-70 (1980)). It was not always so. Some American cities, such as New York, enjoyed great economic and political power before they were emasculated by jealous and fearful state legislatures and the courts. See generally HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983). If the Corporation of the City of New York and cities like it had not been destroyed as political and economic entities, how would urban politics and redevelopment have played out in the twentieth century? Had cities controlled their own destinies, they might have been able to solve many of their endemic problems without resorting to begging for subsidies.

43. Military bases were drawn to Georgia and other southern states because of the great political power of Southern Democrats. See JACOBS, *CITIES*, *supra* note 27, at 94. The massive diversion of federal funds for wastrel land reclamation projects is vividly described in *Cadillac Desert*. See generally REISNER, *supra* note 32.

improved life in Phoenix at the expense of New York and Newark. Furthermore, water subsidies in the West nurtured unprecedented urban growth while older cities festered and withered. Throughout most of this century, federal fiscal power has enabled Americans to flee urban problems in older cities and regions. These federal subsidies have massively underpriced the cost of the new urban centers. All the blame cannot be laid on the shoulders of Washington politicians and bureaucrats, however. Cities contributed to their own corruption and economic decline even before Washington intervened with its highway and housing programs.⁴⁴

Urban and community development has not been a fair game in this century.⁴⁵ Zoning does not provide the general rules called for by Professor Malloy. Zoning has created and sustains middle class suburbs. Suburbanites have rejected the urban cores and have used zoning and political power to grab welcome, clean development and to exclude urban problems such as poverty, poor schools, and crime.⁴⁶

44. The Veterans' Administration mortgage made it an economically unsound decision to remain in the city after World War II. The VA program, coupled with other federal mortgage subsidy programs, accelerated the decline and decay of many American cities in the post-war period. See MARTIN MAYER, *THE BUILDERS* 112-13 (1978). The federal highway system facilitated the further dispersion of the American population. ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION* 177 (1977). See generally Gary T. Schwartz, *Urban Freeways and the Interstate System*, 8 *TRANSP. L.J.* 167 (1976).

Another side effect of the federal policies which encouraged dispersion and urban sprawl is the cost of energy necessary to sustain this lifestyle. Between 1950 and 1980, the U.S. population increased 50% while the number of automobiles increased 200%. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 246 (1985). In 1979, the average American consumed 1.4 gallons of oil per day. Europeans consumed 0.3 gallons and the Japanese consumed 0.2 gallons per day. *Id.* at 297.

The nation has endured several severe energy shocks because of its unwise dependence upon foreign oil. In 1991, the Gulf War was fought to break Saddam Hussein's threatened stranglehold on oil. Nothing has changed since the War ended to reduce dependence upon Mideastern oil. The United States was once the world's largest oil producer. It is now the largest consumer and must import *one half* of its oil supply. This weakens its strategic position and adds to its huge trade deficit. DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER* 14 (1991). As long as oil remains underpriced and the United States lacks a rational energy policy, the United States will be hostage to foreign adventurers and adventures.

45. Urban development has not always employed the general rule Professor Malloy and I commend. Often it has been more a "game" than a rational and principled process. For two good books on the confounding land development process, see RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966) [hereinafter *BABCOCK, ZONING GAME*] and RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985).

46. Suburbs desire light manufacturing, shopping centers, and research and industrial parks. Heavy industry, mental health facilities, and other unaesthetic land uses are relegated to older suburbs and the central cities.

V. THE ROLE OF ZONING AND HOUSING POLICIES IN URBAN DECLINE

Modern zoning began shortly after the turn of the century with the Fifth Avenue Association's attempt to stop the building of massive skyscrapers which plunged the surrounding neighborhood into shadow. The Association was candid in its efforts to push through the first zoning law. It sought to preserve property values and forestall threatening development.⁴⁷ The landmark case of *Village of Euclid v. Ambler Realty Co.*⁴⁸ established the constitutionality of zoning. Euclidian zoning from the start was designed to protect the single family home from the intrusion and "nuisance" of industry and apartments.⁴⁹ Euclid was attempting to protect the quietude of the suburban environment from unwanted intrusions caused by industrial and commercial uses. Multi-unit apartment houses were also clustered near the commercial and industrial uses (undoubtedly because less wealthy individuals and families resided in them) to protect the property values of the single family homeowners. After the Supreme Court blessed the concept of zoning in *Euclid*, communities seized upon zoning as a device to segregate unwanted land uses such as apartments and industry.

During the twentieth century exodus to the suburbs, zoning preserved residential class segregation and property values.⁵⁰ While ostensibly designed to prevent blight, it created value and protected the white middle class who had fled to the suburbs. Zoning and subdivision controls continue to create suburban residential value by preserving "character" which is frequently translated into large lot requirements that effectively exclude the poor and racial minorities.⁵¹

Federal cooperation and connivance was present. Federal home ownership programs intervened dramatically and subsidized white, middle class home ownership in the suburbs.⁵² Concurrently, federal programs destroyed housing capital and credit in poorer, nonwhite

47. ERNEST F. ROBERTS, *THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND* 7, 13 (1982). See also SEYMOUR I. TOLL, *ZONED AMERICAN* 71 (1969).

48. 272 U.S. 365 (1926).

49. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. . . . Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances." *Id.* at 388, 394-95.

50. JACKSON, *supra* note 44, at 240-42. Zoning was not the only culprit. Federal housing policies were created and enforced to preserve white, middle class single-family housing and to prevent housing integration.

51. BABCOCK, *ZONING GAME*, *supra* note 45, at 21.

52. JACKSON, *supra* note 44, at 190-218.

communities. The Home Owner Loan Corporation created red-lining.⁵³ Black residential areas were undesirable, and financing became unobtainable for red-lined communities.⁵⁴ Entire neighborhoods were written off.⁵⁵ For whites, Federal Housing Authority programs made it cheaper to buy than rent. This accelerated the decline of older housing stock in the central cities.⁵⁶ FHA underwriting manuals were highly critical of the older neighborhoods. The FHA endorsed restrictive zoning, and its policies expressed concern with "inharmonious" racial groups.⁵⁷ The FHA moved mortgage funds from savers in the cities and the Northeast and Midwest to borrowers in the suburbs and the West and South. The Federal National Mortgage Association (Fannie Mae) and Government National Mortgage Association (Ginnie Mae), two gigantic federally related lending agencies, implemented this massive capital transfer and subsidy.⁵⁸ Ultimately, bankers and other investors saw cities as the physical evidence that the melting pot was a mistake.⁵⁹

America's urban problems do not stop with poor housing and racial segregation. American cities, many built for a concentrated urban economy in the eighteenth and nineteenth centuries, have found themselves economic losers because industry, technology, and commerce have changed. The cities of the eighteenth, nineteenth, and early twentieth centuries were densely built to take advantage of loft factories, railroads, established ports, and municipal service cores. The advent of the automobile and federal housing policies later dispersed the talented, educated, and wealthy middle class. Suburban zoning and federal housing and transportation policies made the suburbs and exurbs ripe for the new service and post-industrial economy which organized horizontal manufacturing and many service establishments. Manufacturers and serv-

53. *Id.* at 197-203. The Home Owner Loan Corporation created the loan rating system in which undervalued districts were dense, had a mixed population, or were aging. Maps were colored to aid the lenders in underwriting. *Id.* The code developed ranges from A (and Green) (new housing stock and homogeneous community) to D (and Red) (neighborhoods which had declined).

54. *Id.* at 197-98.

55. *Id.* at 202.

56. *Id.* at 205. As multi-unit landlords lost their tenants and urban businesses lost their customers, cities became less desirable places to live and capital was harder to acquire. With federal housing policies in effect, whites fled to cheaper, safer, and more commodious environments.

57. *Id.* at 207-08.

58. *Id.* at 216.

59. *Id.* at 217. Federal housing policies did not forget the poor and the cities. There was substantial investment for more than 50 years in public housing. Public housing and urban renewal projects have ghettoized public housing in this nation. *Id.* at 219-30. For a critical review of federal urban renewal programs, see MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962* (1964).

ice industries shifted to the suburbs as a result of cheaper land,⁶⁰ better transportation and schools, and government assisted relocation.⁶¹

VI. THE CITIES' COUNTERATTACK

Although Professor Malloy is rightly concerned about market and political distortions caused by modern urban redevelopment policies,⁶² he does not take into account that the market was already distorted by decades of political intervention which stripped cities of valuable resources, physical plants, and human capital. In this climate, city leaders did the best they could. They eventually saw that the redevelopment policies of the 1940s and 1950s had failed. Destroying neighborhoods with the federal bulldozer and shoving the displaced poor into high-rise ghettos did not make cities attractive places to raise middle class families. Therefore, they focused on policies to retain professional and service sector employees. In addition, they could not cheaply build large factories and industrial parks on expensive urban land.

60. But is it cheaper? These uses ignore the high cost of oil dependency and the destruction of prime agricultural land. By the late 1970s, the Department of Agriculture announced that over three million acres of prime farmland a year were being lost to suburban development. JACKSON, *supra* note 44, at 284. At the existing rate of "development," over 100 million acres may be lost by the year 2000. ROBERTS, *supra* note 47, at 43. When farm land is paved and built upon, farmers in urban areas must use less productive land. This requires more intensive farming and more reliance upon chemical fertilizers. Suburbs do not take into account the externality of the permanent loss of good farm land, the environmental costs of greater use of fertilizer, or the loss of prime farmland which might have fed millions of hungry residents on this planet.

61. Government assisted programs include the issuance of industrial revenue bonds, tax forgiveness, and tax credits. MALLOY, SERFDOM, *supra* note 4, at 98-102.

62. Malloy believes that the market is being skewed because cities (through subsidies like tax abatements, grants, guaranteed loans, and tax increment financing) have under-priced certain goods, such as hotels, office buildings, and luxury housing, for which there already is a healthy market. Further, he contends that this type of cofinancing is a public misallocation of resources that blurs investment decisions. Government ownership competes with private capital and eliminates government impartiality in decisions. Thus, the city's investment makes it harder for private competitors to act as a countervailing force against public power. *Id.* at 124-25.

The City of Indianapolis's program illustrates the development mix of hotels and commercial and entertainment facilities. *Id.* at 103-12. Federal and state subsidies (when coupled with city programs such as tax increment financing) reduce the cost of investing in the subsidized city when compared to other projects. *Id.* at 113. There is clearly a robust (if not healthy) market for hotels, office buildings, and expensive housing. This market does not rely on the gimmicks Professor Malloy details. Urban developments on the fringes of metropolitan areas have been thriving without these gimmicks. See JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991). Yet, "edge cities" are not perfect models of economic health. Their vitality has been founded upon generous (and economically restrictive) suburban zoning and is doubly enhanced by federal highway and housing policies.

Downtown leaders eventually realized that the shift of the manufacturing and service sector to the suburbs could not be halted.⁶³ Eventually, cities aligned with developers and downtown civic and business leaders to staunch the flow and protect the urban commercial and professional market.⁶⁴ Although the cities' cultivation of an office economy did not reduce poverty or residential unemployment,⁶⁵ they did not sell out their residents' interests in craven service to the business community. Jobs left the city for suburban offices and industrial parks. The national economic emphasis changed from heavy manufacturing, which relied on unions and blue collar workers, to service industries, which are dependent upon an educated and mobile work force.

Cities faced a reduction of federal funds and a leadership vacuum at the national level. Funds were no longer as readily available for urgent urban needs such as housing, education, job training, and services for the poor.⁶⁶ Under these circumstances, cities made reasonable political decisions. They fought to obtain funding for the commercial and professional service center, an area where cities could still compete because the advantages of decentralization were less evident. Although the new urban policies were not an uncritical success, they maintained a market share for cities in the commercial and professional sector in a time of intense competition.⁶⁷ These policies also undoubtedly contributed to the strength of the service and cultural core upon which the economically healthy suburbs drew.⁶⁸ Thus, given their choices and the hostile political

63. After World War II, American industry took advantage of cheaper land in outlying areas to build huge, one-story factories. Skilled workers, who moved into FHA and VA subsidized homes, were nearby. Cheaper transportation for labor, raw materials, and products was supplied by federal and state highway funds. The housing and finance subsidies which favored the suburban, white middle class tilted the playing field against the central cities and older areas of the nation.

64. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 284-85 (1989).

65. *Id.* at 288.

66. *Id.* at 290-91.

67. *See generally id.* at 287-316.

68. The preservice industry land use and investment pattern created a dense urban core which contains a hard to replace infrastructure. The replacement cost of this core and the social externalities which would be attributed to its abandonment have not been counted by Professor Malloy.

Many older urban cores house the community hospitals, universities, colleges, zoos, museums, and government offices. These are expensive to operate and doubly so for urban centers abandoned by residents. Urban center problems are further exacerbated by the fact that these crucial services and institutions are largely non-profit and tax exempt. In many older urban cities, such as Syracuse, 50% or more of the urban land is devoted to tax-exempt properties, government agencies (local, state, and federal), and infrastructures, such as roads, public transit facilities, and water works. Even newer

and economic forces, many cities made a political attempt to preserve a portion of what they economically and culturally did best.

Although the current wave of programs has had destructive effects, they were caused by an uneven playing field. Present politics suggest that the suburbs and metropolitan regions lack the will and the desire to solve urban problems,⁶⁹ yet these programs may have stopped some hemorrhaging while doing untold damage to the political and moral fabric.

VII. FEDERALISM, ECONOMIC NATIONALISM, AND THE MARKET

Although I agree with Professor Malloy that there must be more market freedom and less political interference than is present today, I am not certain the classical liberal view he endorses addresses the problems of the large continental power. Somehow the factions of *The Federalist Papers*⁷⁰ have to be cabined. Adam Smith's ideas are more compatible with the relatively small and homogenous state, like Great Britain during the late eighteenth century, than for a continental state, like the United States or the Soviet Union.

Madison and the Federalists attempted to provide governmental stability and to protect liberty by the American experiment outlined in *Federalist Paper, No. 10*.⁷¹ The authors of *The Federalist Papers* were champions of vigorous government. They had a clear-eyed view of the troubles caused by class and economic divisions in society and a healthy skepticism of the perfectibility of human nature. America had a unique opportunity to choose its form of government. There was an awareness of the failure of democracies and republics.⁷² To preserve this then-

cities, such as Los Angeles, have a significant portion of land devoted to non-taxable purposes such as highways.

Thus, cities have been faced with a shrinking tax base, a high percentage of land which is tax-exempt, and a population which is poorer, less educated, and in need of social services. Modern land use policies and municipal co-investment schemes have probably contributed to the preservation of the vital core and offset, and to some extent, the cost of suburbanization.

69. Because of the weak economy and the federal deficit, cities and states may lack the resources to solve the problems even if they have the desire. Cf. Howard Gleckman et al., *Pity the Poor Taxpayer: States and Cities are Squeezing Ever Harder*, BUS. WK., Sept. 2, 1991, at 32.

70. THE FEDERALIST PAPERS (1787-1788) (Alexander Hamilton, John Jay, and James Madison).

71. This bold experiment was the attempt of the great republic to dissipate the power of factions. THE FEDERALIST NO. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 10].

72. The world had little experience with republics or democracies. Athens, the Roman Republic, Venice, and the Dutch Republic were limited experiments in self-government. None of these states attempted self-government on a continental scale.

radical vision of a self-governing people, "the vigor of government [was] essential to the security of liberty."⁷³ A structure was needed to curb factions, however.

Federalist Paper, No. 10 condemns factions as adverse to the rights and interests of citizens.⁷⁴ Madison, the author of *Federalist, No. 10*, despised the poor performance of state governments after the Revolutionary War. Factions, if unchecked, could set debtor against creditor and merchant against farmer. "Enlightened statesmen [were] not always at the helm."⁷⁵ Because democracies could not control the power and volatility of factions, republicanism and federalism were the structures employed to govern the large republic.⁷⁶ With a great number of citizens and large geographic distances, it was much more difficult for factions to capture government and destroy rights. As Madison stated, "Extend the sphere, and you take in a greater variety of parties and interests: you make it less probable that a majority will have a common motive to invade the rights of other citizens"⁷⁷

To bind the great republic, a powerful and energetic government is necessary. Governmental powers must be commensurate with responsibilities, or government will fail.⁷⁸ The strong, nationalist language of *Federalist, No. 23* provided the text for an energetic federal government which survives today.⁷⁹

73. FEDERALIST NO. 1, *supra* note 3, at 35. This essential Hamiltonian vision carries forward into the *Report on Manufactures*, the national banks, government assistance to build the transcontinental railroads, and other energetic measures designed to bind the nation into a great commercial republic. See Alexander Hamilton, *Report on Manufactures*, in 10 THE PAPERS OF ALEXANDER HAMILTON (Henry Syrett ed., 1966).

74. By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

FEDERALIST NO. 10, *supra* note 71, at 78.

75. *Id.* at 80.

76. *Id.* at 61-62.

77. *Id.* at 82.

78. See generally THE FEDERALIST NO. 23, at 152-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 23].

79. Compare FEDERALIST NO. 23 with Chief Justice John Marshall in *McCulloch v. Maryland*.

Whether there ought to be a Federal Government intrusted with the care of the common defense is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as

The abuse of factions and other political ills have visited us in the twentieth century despite an energetic federalist government.⁸⁰ The political issue which must now be addressed is how to offset these factions and special interests that would destroy the commonwealth. We must also sustain a powerful government able to protect the citizens and capable of economic intervention for the common good.

I am a Federalist, and I believe that a strong central government is necessary to the survival of the United States.⁸¹ Without the benefits of the federal system, the nation might not have prevailed in the War of 1812.⁸² Certainly, the Federalists' nationalism shaped the pre-Civil War United States and gave the Republicans the vision of the union which prevailed.⁸³

I remain unconvinced that the world is headed into markedly more benign and safe times. Although the Cold War has ended, terrorism

a necessary consequence that there can be no limitation of that authority

FEDERALIST No. 23, *supra* note 78, at 153-54.

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and the spirit of the constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

80. Indeed, the energetic federal government is part of the problem because special interest groups have aligned themselves with friends in Congress to produce legislation which has gratified these interests. The urban schemes Professor Malloy deplores and the water reclamation pork barrels have damaged both the economy and the political soul of the country.

81. Professor Malloy and I have discussed where we would fall in political theory regarding the founding of the American nation state. I have always been a Federalist, while he claims some sympathy for the antifederalists. The antifederalists have appeal because they understood the threat posed by government power. I have a hard time visualizing how the young nation would have survived the foreign threats had the Federalists lost. The federal government also effectively checked internal discord when it suppressed the Whiskey Rebellion, and its economic powers welded the states together.

82. I realize that the Federalist Party in New England was a threat to the Union during the war when many New England Federalists threatened secession because of the damaging Embargo Act. Nevertheless, the vision and theory of a strong federal government protecting all of the states from foes, both domestic and foreign, prevailed.

83. When the North won the Civil War, a second American Revolution succeeded. For a fine new book on the second American Revolution, see JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1990). The states' rights, antifederalist, Southern vision of the republic was defeated. The new union was stronger and more centralized. Political and economic power gravitated toward the federal government never to return to the states or the people. Federal power was employed to enfranchise and liberate the former slaves.

In this century, the federal power has been used extensively to redress the hideous wrongs of centuries of enslavement and to eliminate other forms of odious discrimination. This has been a major accomplishment. Centralization and, in this century, the susceptibility to special interest politics and the attempt to solve many of society's problems in Washington threaten to erode liberties, however.

is a constant, and nationalism rears its ugly head. Famine, poverty, national rivalries, and economic competition remain serious threats to peace, freedom, and prosperity. The threat of deliberate or accidental nuclear or biological war remains. During the recent Soviet coup attempt, the idea of breakaway units in the Republics armed with nuclear weapons was a scary proposition.⁸⁴

Therefore, I would maintain a strong national defense even with the thaw.⁸⁵ For me, and for many others, the threat of foreign enemies, while diminished, is still apparent and real. It can be countered in part by a strong military. The military must be well managed, however, lest it undermine the liberty it intends to protect. The military also requires planning and, to a large degree, a planned economy with huge subsidies given to certain contractors and suppliers. This has been part and parcel of our national experience.⁸⁶

84. See, e.g., Patrick E. Tyler, *Gorbachev and Yeltsen Move to Secure Nuclear Weapons*, N.Y. TIMES, Aug. 29, 1991, at A22; Patrick E. Tyler, *Troubling Question: Whose Finger Was on Nuclear Trigger?*, N.Y. TIMES, Aug. 24, 1991, at A9; Douglas Waller, *Nuclear Codes and the Coup: Weapons in the Wrong Hands?*, NEWSWEEK, Sept. 2, 1991, at 57.

85. In his farewell address, President Eisenhower warned about new dangers brought on by the Cold War. "The first was 'the conjunction of an immense military establishment and a large arms industry' which he termed 'the military-industrial complex.' The second was the federal government's domination of research which threatened the future of free, disinterested intellectual inquiry." GEOFFREY PERRETT, *A COUNTRY MADE BY WAR: FROM THE REVOLUTION TO VIETNAM — THE STORY OF AMERICA'S RISE TO POWER* 480 (1989).

The military-industrial complex poses a difficulty for my classical liberal tendencies. If unchecked, it can become a threat to political and economic freedom. In this modern era, however, a large capital plant and large military establishment must be maintained to protect the nation. Armies cannot be created overnight to fight the Redcoats from behind the trees. Surge capacity for the armed forces is required if the nation is to protect its vital interests abroad. Surge capacity is also needed with defense contractors and the defense industry. Billion dollar plants cannot be created in months to build tanks, planes, and ships. A gigantic physical plant and research capacity is needed to support our national defense. Since the end of World War II, government subsidies have been needed to maintain this surge capacity. These subsidies distort the economy, are anticompetitive, and may stifle economic development. Yet, they seem to be necessary to sustain the large military establishment the United States requires to protect its interests.

86. Modern military requirements mandate that great nations maintain surplus manufacturing capacity and subsidize weapons producers. This permits the nation to gear up and develop new weapons systems. Without this subsidized, sometimes wasteful, and structured economy, the surplus capacity would not remain because manufacturers, contractors, and researchers could not afford to provide the human and physical capital resources. What is often forgotten is that the nation's system of procurement has been based upon the notion of dual technologies. Technologies serving both the civilian and military sectors flourish side by side, create wealth, and spur innovation. For example, jet liners trace their heritage to military jets and the electronics industry that was developed for military applications during World War II. *Id.* at 556-57.

VIII. HAMILTONIAN ECONOMICS — YESTERDAY, TODAY, AND TOMORROW

My modest disagreement with Professor Malloy is a difference in degree with respect to the scope and magnitude of government intervention into society and the economy. In addition to the need for planning and government intervention to promote national defense, significant intervention has promoted the nation's economic welfare. Several historic examples illustrate permissible intervention: the Hamiltonian economic policies which founded the commercial republic, the economic nationalist policies before the Civil War, and the Civil War and post-Civil War economic policies which created the transcontinental railroads and fostered industrial and commercial development at the expense of the agrarian interests.⁸⁷

87. The second American Revolution, as Charles Beard viewed it, involved not only the destruction of the southern plantation gentry but also the consolidation of the northern entrepreneurial capitalist class in national power, supported by its rural and urban middle-class allies.

Legislation passed by the Union Congress during the war promoted this development. The Republican party had inherited from its Hamiltonian and Whig forbearers a commitment to the use of government to foster economic development through tariffs to protect industry, a centralized and regulated banking system, investment subsidies and land grants to high-risk but socially beneficial transportation enterprises, and government support for education. By 1860, the Republican party had also pledged itself to homestead legislation to provide farmers with an infusion of capital in the form of free land. Before 1860, the southern dominated Democratic party that controlled the federal government had repeatedly defeated or frustrated these measures. During the war, Republicans passed a higher tariff in 1861, a homestead act, a land grant college act, a Pacific railroad act providing loans and land grants for a transcontinental railroad in 1862, and a national banking act in 1863, which along with the legal tender act of the previous year authorized the issuance of a federal currency. The famous greenbacks gave the national government effective control over the nation's currency for the first time. In addition, to finance the war, the government marketed huge bonds to the public and passed an Internal Revenue Act which imposed a large array of federal taxes for the first time, including a federal income tax.

This astonishing blitz of laws, most of them passed within a span of less than one year, did more to reshape the relation of the government to the economy than any comparable effort except perhaps the first hundred days of the New Deal. This Civil War legislation, in the words of one historian, created a "blueprint for modern America." It helped to promote what another scholar termed "the last capitalist revolution" whereby the Civil War destroyed the "older social structure of plantation slavery" and "installed competitive democratic capitalism" in unchallenged domination of the American economy and polity.

MCPHERSON, *supra* note 83, at 39-40.

National economic development usually requires labor, natural resources capital, and management.⁸⁸ In 1800, America had unlimited natural resources and a scarcity of the other ingredients. Hamilton's *Report on Manufactures* provided the model for our economic development.⁸⁹ Hamilton's seminal report capitalized upon American resources, exploited the inflow of capital, and used immigration to spur development.

Hamilton proposed policies which would import labor and capital⁹⁰ and create capital through publicly funded debt.⁹¹ Hamilton realized that in a capital-scarce economy, the functional equivalent of investment capital could be created through publicly funded debt if investors and lenders had confidence in the national debt being serviced.⁹² The funding of the national debt was accomplished through the national government's assumption of the states' war debt. Although this created a large national debt, it forced capitalists to speculate with the federal government. Prior to the refunding, the states' debts were heavily discounted. Farmers sold these instruments to merchants and speculators in cities. The refunding created great wealth when the obligations were redeemed at face value. This establishment of credit also restored the nation's credit, which had been threatened by defaults by the states. It also created an interregional transfer of wealth from Virginia and the South to New York, Philadelphia, and Boston. When the Southern states paid their taxes, they transferred funds to the federal government to retire the

88. There are some remarkably successful exceptions such as Japan and the city-state of Hong Kong. Neither is blessed with natural resources, but both societies are imbued with the spirit of entrepreneurship.

89. See Hamilton, *supra* note 73, at 230-340.

90. Foreign capital was imported throughout much of the nineteenth century and was instrumental in creating America's network of railroads, turnpikes, and canals. It also funded the steel industry. Capital surpluses

existed in the maturer economies of Western Europe, where returns were less attractive than in areas of capital deficit such as the developing American economy. In consequence, net capital flows into the United States, set in motion primarily by English investors, amounted to \$1.5 billion between 1870 and 1895. Most of the investment went into municipal and other local bonds and into railroads and public utilities, although manufacturing firms were among the beneficiaries.

STUART W. BRUCHEY, ENTERPRISE: THE DYNAMIC ECONOMY OF A FREE PEOPLE 312 (1990).

91. Hamilton, *supra* note 73, at 277, 280.

92. In 1786, the United States was bankrupt. It was unable to service its public debt and was unable to provide necessary funds for garrisoning its borders. BRUCHEY, *supra* note 90, at 118-19. Hamilton's genius in funding the national debt not only created capital (through a multiplier effect), but also provided the means for maintaining the union and protecting property. *Id.* at 119.

debt and at the same time subsidized the commerce and manufacture of the North by payment of import duties which protected new industries. This set the pattern for nearly a century of intersectional wealth transfers.

Another prong of the Hamiltonian plan constituted a tax policy which used revenue protective tariffs and the inland revenue tax. Again, this program promoted an intersectional transfer of wealth from the agrarian West and South to the commercial and manufacturing North.

The third important Hamiltonian strategy was his fiscal policy which argued for the establishment of the Bank of the United States. This national bank and the expansion of credit from secondary, private credit sources augmented the credit created by the funding of the public debt. This newly created capital benefited the Northern cities and their commercial and manufacturing enterprises.

The Hamiltonian policies were remarkably interventionist. They relied on an expansive reading of federal economic powers. They created capital and wealth for the commercial and industrial Northeast at the expense of agrarian interests, and they provided the model for the expansionist policies of the nineteenth century.

The National Bank battles of the Jackson Age were intersectional as was the struggle over protective tariffs.⁹³ New York and New England industries lobbied for tariffs to protect their small manufacturers in the international marketplace. Southern states fought the tariffs in order to permit their farmers to purchase cheap, quality foreign goods. Senator John C. Calhoun of South Carolina protested that the tariffs were a "compulsory tax on agricultural interests everywhere in the nation to support a form of enterprise from which they would receive no benefit. Indeed . . . southern planters were convinced they were subsidizing an interest and a section that were positively inimical to their prosperity."⁹⁴ The West saw the tariffs as offering the opportunity of creating internal improvements in roads and canals to link the East and West into a giant market. Henry Clay unceasingly promoted this economic nationalism.⁹⁵

93. For a brief synopsis of these struggles, see SAMUEL E. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 430-40 (1965).

94. JOHN NIVEN, *JOHN C. CALHOUN AND THE PRICE OF UNION* 134 (1988). Calhoun saw protection as detrimental to the Union and a "force of class and sectional plunder." MORRISON, *supra* note 93, at 432.

95. The American system of Henry Clay and Daniel Webster used the protective tariff to stimulate industrialization. Industrialization benefited all segments of the economy. Agriculture was its home market. Commerce was stimulated with imports and exports. Manufacturing expanded and reaped profits. Wages rose and more jobs were created. Additionally, the American system relied on internal improvement of transportation such as waterways, railroads, and highways which depended heavily on government subsidies. MAURICE G. BAXTER, *ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION* 504 (1984).

The Tariff of 1832 led to South Carolinian resistance and an armed federal response. After the Nullification Crisis abated, the rates were lessened and peace was restored.⁹⁶ After the Civil War, tariff rates were raised to their original levels by Northern Republicans who no longer faced effective opposition from the South. These tariff and internal works projects, like canals, turnpikes, and railroads, favored the commerce and industry of the North and East and created a modern and expanding industrial economy. It is hard to imagine the rapid industrialization of the United States without the use of open immigration, tariffs, and internal improvements.

Methods of finance created by the North during the Civil War and federal assistance to the railroads accelerated capital formation and growth in the North. The North used a variety of techniques: tariffs, excise taxes on consumption, and income taxes. The main instrument was the massive issuance of debt, bonds, and circulated currency in the form of greenbacks.⁹⁷ The monetary policy issue of greenbacks accounted for about sixty-two percent of the debt issued. The reliance on greenbacks caused inflation while real labor wages lagged significantly. Excise taxes fell unevenly, affected the poor and the laborers, and transferred wealth to savers and investors. The federal government's decision to rapidly retire the debt had profound ramifications because this retirement pushed interest rates downward. Lower interest rates and a stable, conservative system of credit encouraged investment.⁹⁸

Although the West would have been settled eventually without the building of the Union Pacific-Central Pacific transcontinental railroad, large scale development and capital formation would have been considerably less. Transcontinental railroads, like other national infrastructure improvements such as canals and turnpikes, needed government subsidies to create what the market was incapable of producing.⁹⁹ Demand constraints justified the federal subsidy, and land grants guaranteed the construction of the transcontinentals.¹⁰⁰

96. ROBERT B. REICH, *THE WORK OF NATIONS: PROGRAMMING OURSELVES FOR 21ST CENTURY CAPITALISM* 22 (1991).

97. BRUCHEY, *supra* note 90, at 258-59.

98. *Id.* at 259-60.

99. Folklore often deplores the behavior of capitalists in the construction of the Union Pacific and other western railroads. See MATTHEW JOSEPHSON, *ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901* (1934). Although there were some abuses by speculators and venal politicians, the financing of the railroads seems much less scandalous when the whole story is understood in terms of the actual finances and options available at the time. See generally 1 MAURY KLEIN, *UNION PACIFIC: THE BIRTH OF A RAILROAD 1862-1893* (1987).

100. BRUCHEY, *supra* note 90, at 271.

Railroads contributed to the nation's growth by cutting transportation costs. These savings, in the range of ten percent of the Gross National Product, were released for other ventures. Railroads tied together the national market. Price competition and price equilibrium ensued as the East was bound to the West and Midwest. Railroads encouraged large scale Western agriculture and the shipment of bulk goods of all types. The railroad industry and its industrial and commercial offshoots accelerated commercialization and regional specialization.¹⁰¹

The post-Civil War industrial policy that preferred industry over agriculture and the Eastern bankers over the West was correct because it led to massive formation of capital and the development of new markets. Productivity was elevated, and the national standard of living rose dramatically. Consumer and political choices abounded. Today, we still need government intervention and subsidies in projects for areas of the economy where there is a market failure or an urgent societal need, such as transportation, education,¹⁰² health care,¹⁰³ the space program, and national defense.

IX. CONCLUSION

Classical liberal economics and politics are predicated upon freedom, rational choices, and principled decisions.¹⁰⁴ The ideal liberal world of Adam Smith's market, like the Cave of Plato,¹⁰⁵ did not exist even in

101. *Id.* at 269.

102. I favor a voucher system because it encourages better schools through competition and gives families freedom of choice.

103. In addition to creating a rational health care system to get costs under control and provide decent medical care for all citizens, I am in favor of income assistance for the poor. Senator Moynihan's Negative Income Tax is my preferred model. It would be easy to administer, and it would give the poor the greatest control over their economic lives. See U.S. DEPARTMENT OF LABOR, OFFICE OF POLICY PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION*, 89TH CONG., 1ST SESS. (1965). For more information on negative income tax schemes, see GEORGE H. HILDEBRAND, *POVERTY, INCOME MAINTENANCE, AND THE NEGATIVE INCOME TAX* (1967).

104. The general rules to which classical liberals subscribe and the restraint they exercise in the political arena promote liberty and personal freedom.

105. See generally PLATO, *THE REPUBLIC OF PLATO* (Alan Bloom trans., 1968). *The Republic* is not commended as a model of good government or good society. Its authoritarianism is anathema of classical liberal thought. The idealism espoused by Plato and his adherents creates standards which are intentionally unattainable. This can be contrasted with the concrete political and moral thought of Aristotle in Blackstone's *Commentaries*. See generally ARISTOTLE, *THE POLITICS OF ARISTOTLE: A TREATISE ON GOVERNMENT* (William Ellis trans., 1947). WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1983) (1765).

Ideal virtues cannot be checked by reality, and idealism has often been used by tyrants and religions to enslave mankind. Nevertheless, the Cave and the Republic, fictions that they are, remain intellectual lodestones for humanity, notwithstanding their mischief.

Smith's time. Smith's observations, morality, and sentiments are timeless, however. Nevertheless, they have proven difficult to apply in the continental state that was and is America.

I do not have answers to all the issues Professor Malloy raises. He intelligently discusses the crucial relationship of the market to political freedom and personal liberty, and he exposes the fallacies of the movements which have caused the nation's drift.

How do we unleash the market forces with so many arrayed against them? We can start with Smith's insight to release the market energy to create enterprises, sustain growth, protect the commonweal, and preserve liberty and order.

Planning for Serfdom — An Epilogue on Law, Economics, and Values

ROBIN PAUL MALLOY*

It is important not to confuse opposition against this kind of planning with a dogmatic laissez-faire attitude. The liberal argument is in favor of making the best possible use of the forces of competition as a means of coordinating human efforts, not an argument for leaving things just as they are. It is based on the conviction that, where effective competition can be created, it is a better way of guiding individual efforts than any other. It does not deny, but even emphasizes, that, in order that competition should work beneficially, a carefully thought-out legal framework is required and that neither the existing nor the past legal rules are free from grave defects. Nor does it deny that, where it is impossible to create the conditions necessary to make competition effective, we must resort to other methods of guiding economic activity.

Friedrich A. Hayek
*The Road to Serfdom*¹

In *Planning for Serfdom*² and much of my other work³ I have taken inspiration from the classical liberal philosophy of Adam Smith, Friedrich Hayek, and Milton Friedman. First and foremost in my efforts has been an attempt to provide new definition to the field of study commonly

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1. Contemporary events differ from history in that we do not know the results they will produce. Looking back, we can assess the significance of past occurrences and trace the consequences they have brought in their train. But while history runs its course, it is not history to us. It leads us into an unknown land, and but rarely can we get a glimpse of what lies ahead.

FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 36 (1944).

2. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

3. See Robin P. Malloy, *Planning for Serfdom — An Introduction*, 25 IND. L. REV. 621 (1992).

referred to as Law and Economics.⁴ This area of study has been too long dominated by the rhetoric of Judge Richard Posner and other neoclassical Chicago School legal economists. Although their contributions have been many, their shortcomings have also been tremendous. Chief among these has been their relentless pursuit of economic "science" applied to law. Borrowing from modern practices in economics, these legal economists seek to cleanse the corpus of law and vanquish from memory all traces of moral discourse and value conflicts. They seek to mimic the twentieth century economists' continuing efforts to wash away layers and layers of historical commitment to philosophy. They seek science, not morality. They discuss equations, not values. They cherish a tradition cleansed of its innermost feelings and offer a foundationless and hollow structure of "scientific" brick and mortar as their accomplishment. They have been misguided in their efforts. Economics, efficiency, and wealth maximization applied to law and social policy is not science, nor is it a neutral, objective, or valueless end to be achieved.⁵ The end to be achieved, rather, is intrinsically value driven and any successful form of economic discourse serves only as a means of attaining that end.

Adam Smith, Friedrich Hayek, and Milton Friedman understood that any particular social, economic, and political arrangement had to be evaluated for the subjective ends to be promoted. They understood that capitalism and free market economics supplied a philosophical foundation for structuring social organization, not just because it produced wealth, but more importantly, because it enhanced freedom, liberty, and autonomy.⁶ Admittedly, each had their own view of what these amorphous terms meant. However, their key insight is that they each understood that economics and law, as complex systems, were about enhancing specific subjective values.

4. See, e.g., ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990) [hereinafter MALLOY, *LAW AND ECONOMICS*] (this basic introductory text is designed to introduce the reader to Law and Economics while presenting that subject matter in a new format); Robin P. Malloy, *Toward A New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27 (1991) [hereinafter Malloy, *Discourse*].

5. See Robin P. Malloy, *Is Law and Economics Moral? — Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U. L. REV. 147 (1990); Robin P. Malloy, *The Limits of "Science" in Legal Discourse — A Reply to Posner*, 24 VAL. U. L. REV. 175 (1990) (these articles make up my part of a published debate with Judge Richard Posner and include arguments and references to other works illustrating the significant difference between his view and my view of Law and Economics).

6. A free society, I believe, is a more productive society than any other; it releases the energies of people, enables resources to be used more effectively, and enables people to have a better life. But that is not why I am in favor of a free society. I believe and hope that I would favor a free society even if it were less productive than some alternative-say, a slave society. . . .

I favor a free society because my basic value is freedom itself.
Milton Friedman, *Free Markets and Free Speech*, 10 HARV. J.L. & PUB. POL'Y 1 (1987).

I have made the Smith-Hayek-Friedman insight the cornerstone of my teaching and research. It is in fact the basic premise of *Planning for Serfdom*. Although hopefully my book brings many issues to light concerning downtown development, it is first and foremost a book on law, economics, and values. I attempt to illustrate that law and economics as a creative process, as a method for inquiry, can be helpful in unmasking hidden values and ideological commitments in the communities that surround us.⁷ I present my subjective commitment to classical liberal principles as a referential guidepost for the values I believe are important, values that are consistent with traditional rhetorical and discursive positions evident in American political and legal history as well as much of our popular culture. I use these referential guideposts as a lens for viewing current practices involving downtown development and revitalization.

Law and economics, as I understand it, concerns itself with any discourse involving the allocation of political power and scarce resources. Thus, any number of competing ideological perspectives can rightly be considered the subject matter of law and economics.⁸ Therefore, the first task of the legal economist is inherently one of trying to uncover the values promoted or challenged by alternative ideological frameworks. The second task is to argue persuasively for the promotion of one particular framework (set of values) over that of the others. Lawyers and economists miss their greatest opportunities for insight and for contributing to our social evolution if they fail to converse directly on the subject of competing and oftentimes conflicting value choices. Analyzing what governments are doing in the area of downtown development is one example of how to use this approach. There are many other areas and many other examples that are in need of study.

I think *Planning for Serfdom* opens the door for an important reconsideration of what is going on in America's cities. If the book serves as a useful new vehicle for reexamination, it is a success. It is good that different people have different reactions to it. We live in a free society where as individuals, we are free to possess and create many individual perspectives. The classical liberal marketplace is enhanced by this discourse. I am thankful to the *Indiana Law Review* for providing such a wonderful forum for this discussion.

7. See, e.g., ROBERTA KEVELSON, FOUNDATIONS OF SEMIOTICS — CHARLES S. PEIRCE'S METHOD OF METHODS (1987) (discussing the method of methods in complex sign systems); Robin P. Malloy *Discourse*, *supra* note 4 (discussing law and economics as a creative process and method).

8. See, e.g., MALLOY, SERFDOM, *supra* note 2, at 61-83; MALLOY, LAW AND ECONOMICS, *supra* note 4; Malloy, *Discourse*, *supra* note 4.

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NOTES

Aiding and Abetting Securities Fraud

INTRODUCTION

Section 10(b) of the Securities Exchange Act of 1934 (1934 Act)¹ and Securities and Exchange Commission (SEC) Rule 10b-5² prohibit fraud in connection with the purchase or sale of securities.³ The fraud

1. Section 10(b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1988).

2. Rule 10b-5, promulgated by the SEC in accordance with its authority under § 10(b), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1991).

3. Section 10(b) is a catchall provision of the Securities Exchange Act of 1934, “but what it catches must be fraud.” *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980).

which is actionable under Section 10(b) of the 1934 Act and SEC Rule 10b-5 is limited to: (a) manipulative practices which artificially affect securities markets in a way misleading to investors and (b) misrepresentations or omissions of material facts made in connection with the purchase or sale of securities.⁴

The securities laws do not provide a private civil remedy for violation of section 10(b). An implied private right of action for damages under Section 10(b) and Rule 10b-5 was first recognized in 1946 by a federal district court,⁵ and its existence has been described by the United States Supreme Court as "well established"⁶ and "simply beyond peradventure."⁷ The Court found that a private remedy under Section 10(b) and Rule 10b-5 had received overwhelming support in the lower federal courts, was a needed supplement to SEC enforcement of the anti-fraud rules, and was consistent with ensuring that Congress' broad remedial purposes in enacting the 1934 Act were fulfilled.⁸

Although the Court's policy in shaping the private action under Section 10(b) and Rule 10b-5 has been to construe these provisions "not technically and restrictively, but flexibly to effectuate [their] remedial purposes,"⁹ the Court has, in the Section 10(b) private action context, begun to prune¹⁰ this "judicial oak grown from a legislative acorn."¹¹

4. *Sante Fe Indus., Inc. v. Green*, 430 U.S. 462, 474-77 (1977).

5. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). The court predicated its finding of an implied private right of action on the tort law maxim, *ubi jus ibi remedium*, i.e., where there is a right, there is a remedy. *Id.* at 513.

6. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976).

7. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983).

8. See, e.g., *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (private action under § 10(b) and Rule 10b-5 "constitutes an essential tool for enforcement of the 1934 Act's requirements"); *Herman & MacLean*, 459 U.S. at 380 & n.10 (private remedy has been consistently recognized for over 35 years); *Sante Fe Indus.*, 430 U.S. at 477-78 (recognizing private action fulfills the fundamental purpose of the 1934 Act which is a philosophy of full and fair disclosure in securities transactions); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (private enforcement provides a necessary supplement to SEC action).

9. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

10. See Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637 (1988). The authors divide the Supreme Court's decisions construing the federal securities laws (the Securities Act of 1933, 15 U.S.C. § 77a (1988), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1988)) into an "Expansion Era," lasting until about 1974 and a "Contraction Era," which began about 1975. Bromberg & Lowenfels, *supra*, at 648 nn.63-64. In the Contraction Era, the Court refused to recognize new implied rights of action, restricted old implied rights of action, criticized all implied rights of action, and cut back on the SEC's enforcement powers. *Id.* at 648 n.64.

11. *Blue Chip Stamps*, 421 U.S. at 737 ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative

This Note focuses on another judicially-created branch of Section 10(b) — aiding and abetting liability under Section 10(b) and Rule 10b-5. A cause of action for aiding and abetting Section 10(b) securities fraud (both private actions and SEC enforcement actions) has been implied by all of the federal circuit courts of appeals that considered the issue.¹² The Supreme Court has yet to decide whether aiding and abetting is a valid basis for liability under Section 10(b) and Rule 10b-5 and has twice reserved decision on this issue.¹³ This Note focuses on

acorn.”). The basic elements of a private action under § 10(b) and Rule 10b-5 are: (1) plaintiff is an actual seller or purchaser of the securities; and (2) defendant made a misstatement or omission; (3) of a material fact; (4) with scienter, i.e., an intent to deceive, manipulate, or defraud; (5) on which the plaintiff relied; and (6) that proximately caused his injury. *See, e.g.,* Schlifke v. Seafirst Corp., 866 F.2d 935, 943 (7th Cir. 1989); Shivangi v. Dean Witter Reynolds, Inc., 825 F.2d 885, 888 n.6 (5th Cir. 1987); Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 61 (2nd Cir. 1985); Hartman v. Blinder, 687 F. Supp. 938, 941 (D.N.J. 1987). *See also Basic Inc.*, 485 U.S. at 231-32 (materiality requires “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available,” and proof of reliance is essential to a § 10(b) action); Chiarella v. United States, 445 U.S. 222 (1980) (omissions without a duty to disclose are not actionable); Sante Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (holding that § 10(b) fraud is limited to misstatements and omissions of material facts and manipulations of securities markets); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (requisite scienter is intent to deceive, manipulate or defraud; rejecting negligence as basis for liability); *Blue Chip Stamps*, 421 U.S. at 723 (persons who would have purchased or sold securities had the defendant not misrepresented the attractiveness of the investment do not have standing under § 10(b)); *Affiliated Ute Citizens*, 406 U.S. at 153 (positive proof of reliance not required where case involves primarily a failure to disclose); *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971) (defendant’s misstatement or omission must touch the plaintiff’s decision as an investor to purchase or sell the securities in order to meet the “in connection with” requirement).

12. *See* Robin v. Arthur Young & Co., 915 F.2d 1120 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987); Moore v. Fenex, Inc., 809 F.2d 297 (6th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987); Woods v. Barnett Bank, 765 F.2d 1004 (11th Cir. 1985); Cleary v. Perfectune, Inc., 700 F.2d 774 (1st Cir. 1983); Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983); Stokes v. Lokken, 644 F.2d 779 (8th Cir. 1981); IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793 (3d Cir. 1978), *cert. denied*, 439 U.S. 930 (1978); Woodward v. Metro Bank, 522 F.2d 84 (5th Cir. 1975); SEC v. Coffey, 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); Zabriskie v. Lewis, 507 F.2d 546 (10th Cir. 1974); Brennan v. Midwestern United Life Ins. Co., 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). This Note focuses on the implied private right of action for aiding and abetting liability, rather than the SEC’s use of an aiding and abetting liability theory in enforcement actions. For separate treatment of the SEC enforcement action, see Bromberg & Lowenfels, *supra* note 10, at 752-70.

13. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379 n.5 (1983); *Ernst & Ernst*, 425 U.S. at 191 n.7.

a comparison of the approach used in the Seventh Circuit Court of Appeals and in the other circuits regarding aiding and abetting liability. The Note suggests that the Seventh Circuit's framework for analyzing liability better reflects the Supreme Court's "Contraction Era philosophy"¹⁴ for Section 10(b) and Rule 10b-5 securities fraud.

Part I of this Note examines the theory of aiding and abetting Section 10(b) and Rule 10b-5 securities fraud, including the borrowed concepts from tort and criminal law which support a recognition of this theory. Next, this Note focuses on the Seventh Circuit's different approach to this theory of liability, and includes a discussion of the courts' conceptual distinctions between primary liability and aiding and abetting liability and the substantive tests for aiding and abetting liability. Finally, this Note compares the Seventh Circuit's position with the other circuits' positions regarding the required mental state and the duty of disclosure in the aiding and abetting context.

I. THE THEORY OF AIDING AND ABETTING LIABILITY

Aiding and abetting is a form of secondary liability under federal securities law.¹⁵ Secondary liability is broadly described as "the judicially implied civil liability which has been imposed on defendants who have not themselves been held to have violated the express prohibition of the securities statute at issue, but who have some relationship with the primary wrongdoer."¹⁶ Secondary liability is a hybrid theory based upon tort and criminal law concepts.

14. The term, "Contraction Era," is used in Bromberg & Lowenfels, *supra* note 10, at 648 n.64.

15. The federal securities laws include the Securities Act of 1933, 15 U.S.C. § 77a (1988) and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1988). This Note focuses on aiding and abetting liability under § 10(b) of the 1934 Act. Courts have implied an action for aiding and abetting liability under other sections of the securities laws, for example, § 12(2) of the 1933 Act, 15 U.S.C. § 77l(2) (1988), and § 17(a) of the 1934 Act, 15 U.S.C. § 78q(a) (1988). See Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CALIF. L. REV. 80, 109-11 (1981).

16. Fischel, *supra* note 15, at 80 n.4. Other forms of secondary liability imposed by courts are conspiracy liability and respondeat superior liability. *Id.* at 85-87. See also Bromberg & Lowenfels, *supra* note 10, at 639-40 nn.8 & 10. A form of secondary liability expressly provided for in the 1933 and 1934 Acts is control person liability. Section 15 of the 1933 Act states:

Every person who . . . controls any person liable under [the express liability provisions of §§ 11 and 12] shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which

A. *Genesis in Tort Law and Criminal Law*

1. *Tort Law Antecedent*.—Like the 1946 decision in *Kardon v. National Gypsum Co.*,¹⁷ where the court turned to tort law principles in implying a private remedy under § 10(b) and Rule 10b-5, early court decisions recognizing liability for aiding and abetting a Section 10(b) violation relied on tort law principles, primarily the *Restatement of Torts* section 876(b).¹⁸ Section 876(b) provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance or encouragement to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.¹⁹

The first major decision to explicitly turn to the tort law principles set forth in Section 876(b) for imposing Section 10(b) aiding and abetting liability was *Brennan v. Midwestern United Life Insurance Co.*²⁰ The *Brennan* case, an influential decision,²¹ helps demonstrate the tort basis for aiding and abetting liability. The *Brennan* court found the defendant life insurance company, Midwestern, civilly liable as an aider and abettor of a violation of Section 10(b) by a brokerage firm, Dobich Securities Corporation.²²

the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o (1988). Section 20(a) of the 1934 Act states:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Id. § 78t(a).

17. 69 F. Supp. 512 (E.D. Pa. 1946). *See supra* note 5.

18. *See, e.g.,* Landy v. FDIC, 486 F.2d 139 (3rd Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *Brennan v. Midwestern United Life Ins. Co.*, 259 F. Supp 673 (N.D. Ind. 1966).

19. RESTATEMENT (SECOND) OF TORTS § 876 (1977).

20. 286 F. Supp. 702 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

21. *See* David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution*, 120 U. PA. L. REV. 597 (1972) (calling *Brennan* "to date the most important securities law case dealing with secondary liability").

22. *Brennan*, 286 F. Supp. at 702.

Dobich created an artificially-high market price for Midwestern stock through a short-selling scheme²³ involving a significant percentage of the total shares sold of Midwestern stock.²⁴ Instead of covering all of his short sales, Dobich used his customers' purchase funds for his own capital needs, concealing his scheme by abnormally delaying deliveries to his customers of their Midwestern stock and lying to them about the reasons for the late deliveries. Dobich's scheme finally collapsed, leaving \$2,900,000 worth of purchased Midwestern stock undelivered. The trial court found Midwestern liable as an aider and abettor to a class of plaintiffs who purchased, but never received, Midwestern stock from Dobich.²⁵

The Seventh Circuit affirmed, holding that Midwestern aided and abetted securities fraud through knowing and purposeful encouragement and assistance to Dobich's continued market manipulation of Midwestern's stock.²⁶ Midwestern knew that Dobich improperly used customer funds, failed to report Dobich to the Indiana Securities Commission, and affirmatively signaled Dobich that it would not report Dobich's unusual activity to the Commission if Dobich would deliver purchased stock to the customers who complained to Midwestern about late delivery.²⁷ Further, Midwestern benefited from Dobich's manipulative active trading because the increased stock price put Midwestern in a favorable position for a pending stock-exchange merger.²⁸ The court concluded

23. A short-sale is "[a] contract for sale of shares of stock which the seller does not own, or certificates for which are not within his control, so as to be available for delivery at the time when, under rules of the exchange, delivery must be made." BLACK'S LAW DICTIONARY 1237 (5th ed. 1979). Short sales are not illegal but, in *Brennan*, they were part of a manipulative scheme because Dobich was not covering (buying and delivering) his short sales.

24. In a 14-month period, from May 1964 to July 1965, Dobich brokered about 21% of the total shares presented by all brokers to Midwestern for transfer on its books. *Brennan*, 417 F.2d at 151.

25. *Brennan v. Midwestern United Life Ins. Co.*, 286 F. Supp. 702, 728 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

26. *Brennan*, 417 F.2d at 154.

27. After Midwestern received several complaints of late deliveries of Midwestern stock from Dobich customers, Midwestern informed Dobich that it suspected Dobich of misusing customer funds and threatened to refer the matter to the Indiana Securities Commission should further complaints be made. Midwestern did not follow-up on its threat, but instead began advising complaining Dobich customers by letter to contact Dobich and to then contact the Indiana Securities Commission if Dobich did not deliver their stock or give a satisfactory explanation for late delivery. Midwestern sent Dobich copies of these letters. The court interpreted these letters as a signal to Dobich that if deliveries were made to the customers who made complaints, Midwestern would not involve regulatory authorities, who would have uncovered Dobich's scheme, putting an end to the propped-up Midwestern stock price. *Id.* at 150-54.

28. *Id.* at 151-54. The exchange ratio, one share of Midwestern stock for ten shares of the merger company's stock, was based primarily on market price. *Id.* at 151-52.

that Midwestern's actions "amounted to a tacit agreement with Dobich to prevent complaints from reaching the Commission, thus facilitating the fraud and allowing Dobich's scheme to continue to Midwestern's benefit."²⁹

A tort law approach, which considers an actor's knowledge of another's wrongful acts and the actor's assistance or encouragement of those acts, is manifested in the majority approach among the circuits for Section 10(b) and Rule 10b-5 aiding and abetting liability.³⁰

2. *Criminal Law Antecedent*.—Courts also borrow a criminal law theory of aiding and abetting for imposing Section 10(b) and Rule 10b-5 aiding and abetting liability.³¹ In the criminal law context, a defendant aids and abets another's criminal act if the defendant "in some sort associate[s] himself with the venture, . . . participate[s] in it as something he wishes to bring about, [and] seek[s] by his action to make it succeed."³² Criminal aiding and abetting focuses on an actor's *intent* to participate in and further another's wrongful acts.

Although it might appear that the criminal law analog of aiding and abetting is more severe than the tort law analog, courts have not suggested such a distinction in securities fraud cases. For example, in *IIT v. Cornfeld*,³³ the Second Circuit described aiding and abetting securities fraud liability using criminal law concepts, but analyzed the defendants' liability using the conventional tort law knowledge/assistance model.³⁴

3. *Significance of Distinction Between Tort Law and Criminal Law Antecedent*.—In general, there is not an overriding significant difference in Section 10(b) and Rule 10b-5 aiding and abetting liability decisions depending on whether a tort law or criminal law antecedent is espoused. In fact, courts sometimes acknowledge both tort and criminal law bases of aiding and abetting.³⁵ It is, however, interesting that the Seventh Circuit, which no longer analyzes Section 10(b) and Rule 10b-5 aiding and abetting liability based on the *Brennan* tort law knowledge and substantial assistance model, describes the aiding and abetting securities

29. *Id.* at 155.

30. *See infra* notes 66, 67.

31. *See* *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987); *SEC v. Timetrust, Inc.*, 28 F. Supp. 34 (N.D. Cal. 1939).

32. *Zoelsch*, 824 F.2d at 36 (quoting *Nye & Nissen v. United States*, 366 U.S. 613, 619 (1949)).

33. 619 F.2d 909 (2d Cir. 1980).

34. *Id.* at 922.

35. *See, e.g.*, *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1311 (9th Cir. 1982); *SEC v. Coffey*, 493 F.2d 1304, 1315-16 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

fraud rubric as an example of judicially-creative borrowing of criminal law concepts.³⁶

Further, the Supreme Court has cautioned that reliance on tort law principles for implying private rights of action under the securities laws is misplaced.³⁷ Whether a private right of action exists must be based on statutory construction and an analysis of congressional intent.³⁸ Reliance on criminal law concepts to imply private rights of action is therefore similarly misplaced.³⁹

The misplaced reliance on tort and criminal law antecedents in fashioning Section 10(b) and Rule 10b-5 aiding and abetting liability prompted commentators to question the continued viability of this theory, particularly given the Supreme Court's narrowing of the scope of the federal securities laws.⁴⁰ The Seventh and Ninth Circuits, as well as some federal district courts, have also questioned the status of this theory.⁴¹ To date, no circuit court has decided to do away with aiding and abetting securities fraud liability. Moreover, it is likely that courts will continue to recognize this theory until the Supreme Court says differently. In fact, the Seventh Circuit, although questioning the continued propriety of implying this cause of action, stated that "[o]ur recognition of aider

36. *Latigo Ventures v. Laventhol & Horwath*, 876 F.2d 1322, 1327 (7th Cir. 1989).

37. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). The Court rejected an argument implying a private right of action under § 17(a) of the 1934 Act, 15 U.S.C. § 78q(a) (1988), which was based upon tort law principles, as "entirely misplaced." *Touche Ross*, 442 U.S. at 568.

38. *Touche Ross*, 442 U.S. at 568.

39. Criminal law may, however, support continued use in SEC enforcement actions of aiding and abetting liability if the SEC is permitted to rely on the general federal criminal aiding and abetting statute. 18 U.S.C. § 2(a) (1988). This statute provides that aiders and abettors of an offense against the United States are punishable as principals. *Id.* The early case of *SEC v. Timetrust, Inc.*, 28 F. Supp. 34, 43 (N.D. Calif. 1939), relied on such a criminal statute in upholding an SEC injunction complaint against alleged aiders and abettors of § 17(a), a provision which is similar to § 10(b) and Rule 10b-5.

40. See *Bromberg & Lowenfels*, *supra* note 10, at 639-61; *Fischel*, *supra* note 15, at 89-94.

41. See *Congregation of the Passion, Holy Cross Province v. Kidder Peabody & Co.*, 800 F.2d 177, 183 (7th Cir. 1986) ("[T]here is some ambiguity about the existence of a civil cause of action for aiding and abetting a section 10(b) and Rule 10b-5 violation."); *Little v. Valley Nat'l Bank*, 650 F.2d 218, 220 n.3 (9th Cir. 1981) ("The status of aiding and abetting as a basis for liability under the securities laws is in some doubt."); *Seattle-First Nat'l Bank v. Carlstedt*, 101 F.R.D. 715, 722-23 (W.D. Okla. 1984) ("The notion that aiding and abetting securities fraud constitutes a justiciable violation of law is itself a questionable assertion."), *rev'd*, 800 F.2d 1008 (10th Cir. 1986); *Benoay v. Decker*, 517 F. Supp. 490, 495 (E.D. Mich. 1981), *aff'd mem.*, 735 F.2d 1363 (6th Cir. 1984) ("It is . . . doubtful that a claim for 'aiding and abetting' . . . will continue to exist under 10(b).").

and abettor liability is rooted in 20+ years' precedent . . . and we stand by this decision until the Supreme Court tells us otherwise."⁴²

The implicit demand for guidance from the Supreme Court may serve to prompt the Court to address directly the propriety of Section 10(b) and Rule 10b-5 aiding and abetting liability.⁴³ Other factors also indicate that this theory of liability is "ripe" for adjudication by the Supreme Court. The theory has had time to develop in the lower federal courts,⁴⁴ has received critical examination by commentators,⁴⁵ and a split has emerged between the Seventh Circuit and the other circuits regarding the proper analytical framework for aiding and abetting securities fraud liability. The Seventh Circuit's split from the other circuits emerges in the courts' conceptual distinctions between primary liability and aiding and abetting liability.

B. Conceptual Distinction Between Primary Liability and Aiding and Abetting (Secondary) Liability

Aiding and abetting is the most widely used theory for holding persons not in privity with the deceived buyer or seller of securities liable for Section 10(b) and Rule 10b-5 securities fraud.⁴⁶ A closer look at the conceptual distinctions between primary liability and aiding and abetting liability under these antifraud provisions reveals distinguishing features of the Seventh Circuit's approach. The following discussion first examines the conceptual distinctions advanced by courts other than the Seventh Circuit, and second, examines those advanced by the Seventh Circuit.

1. *Courts Other Than the Seventh Circuit.*—Several courts use a direct participant/indirect participant duality to explain the difference between primary and aiding and abetting (secondary) liability. *Smith v. Ayres*⁴⁷ illustrates this distinction. In *Smith*, a shareholder in a family-owned, close corporation brought a derivative action alleging that the corporation had been fraudulently induced to issue shares to an individual, Clayton. In issuing the shares, the board of directors relied on

42. *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1123 (7th Cir. 1990).

43. The Court twice reserved decision on this issue. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379 n.5 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191 n.7 (1976).

44. In 1969, the Seventh Circuit decided *Brennan v. Midwestern United Life Ins. Co.*, 417 F.2d 147 (7th Cir. 1969), the first circuit court decision recognizing § 10(b) and Rule 10b-5 aiding and abetting liability.

45. See Bromberg & Lowenfels, *supra* note 10; Fischel, *supra* note 15; Ruder, *supra* note 21.

46. Bromberg & Lowenfels, *supra* note 10, at 639.

47. 845 F.2d 1360 (5th Cir. 1988).

a letter that was presented to the board, but contained misrepresentations.⁴⁸ The court decided that Clayton could not be a primary violator of Section 10(b) and Rule 10b-5 because the complaint did not show that Clayton had been a direct participant in the alleged fraud against the corporation.⁴⁹ Direct participation was lacking because the complaint did not sufficiently allege that Clayton assisted in the preparation of the letter or its presentation to the board.⁵⁰ The court also ruled the complaint insufficient as to indirect participation, i.e., aiding and abetting.⁵¹ Similarly, the Ninth Circuit used a direct participation label to distinguish primary liability from aiding and abetting liability.⁵²

The Sixth Circuit used a direct contacts characterization to differentiate between a primary violation and an aiding and abetting violation of Section 10(b) and Rule 10b-5 in *SEC v. Coffey*.⁵³ In *Coffey*, a company sold \$5,000,000 worth of its notes to the State of Ohio. The SEC alleged that misrepresentations had been made to the state and a rating agency in connection with the state's purchase of the company's notes.⁵⁴ In deciding if the company treasurer could be primarily liable under Section 10(b) and Rule 10b-5, the court looked to whether the treasurer had direct contacts with the parties who were misled.⁵⁵ The Sixth Circuit explained in a later case that a person meets the direct contacts criteria, which gives rise to primary liability, when that person "undertak[es] to furnish information which is misleading because of a failure to disclose a material fact."⁵⁶

A slightly different conceptual distinction between primary and aiding and abetting liability was suggested in *DMI Furniture, Inc. v. Brown*,

48. Upon the issuance of the shares, effective control of the corporation shifted away from the complainant shareholder who alleged that the fraudulent plan to issue the shares allowed corporate assets to be diverted for improper purposes.

49. *Smith*, 845 F.2d at 1365.

50. *Id.*

51. *Id.*

52. See *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1312 (9th Cir. 1982) ("An accountant may be liable for direct violation of [Rule 10b-5] if its participation in the misrepresentation is direct.").

53. 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

54. In order to qualify to sell its notes to the state, the company obtained a "prime" rating for its commercial paper from the rating agency. *Id.* at 1308.

55. *Id.* at 1315.

56. *SEC v. Washington County Util. Dist.*, 676 F.2d 218, 223 (6th Cir. 1982). See also *Mercer v. Jaffee, Snider, Raitt & Heuer*, 713 F. Supp. 1019, 1025 (W.D. Mich. 1989) ("A person undertaking to furnish information which contains a material misstatement or omission is a primary participant, so long as he or she is not so far removed from the transmission of the misleading information that liability would necessarily become vicarious.").

*Kraft & Co.*⁵⁷ According to the *DMI* court, the imposition of primary liability is limited to the actual buyer and seller of securities, and

defendants who had acted in capacities in which their liability was expressly prescribed by specific statutory provisions, or in which their allegedly violative acts were done in the performance of a role which is understood and contemplated to be an integral part of the statutory scheme adopted by Congress for the protection of investors.⁵⁸

The direct participation and direct contacts distinctions used by the circuit courts seem to be based on the nearness of the relationship between the defendant's acts and the plaintiff's injury, a kind of proximity analysis. In contrast, the Seventh Circuit's conceptual distinction is more like the *DMI* formulation.

2. *The Seventh Circuit.*—The Seventh Circuit's conceptual distinction between primary liability and aiding and abetting liability is like the *DMI* formulation to the extent that primary liability is limited to persons who acted in capacities in which their liability is expressly prescribed by provisions of the 1933 and 1934 Acts. The Seventh Circuit determined that a natural reading of Section 10(b) and Rule 10b-5 is that these provisions apply only to the same people otherwise covered by the 1933 and 1934 Acts.⁵⁹ Thus, the antifraud provisions are directed at: (a) an issuer of securities, members of the issuer's board of directors, and those who sign a prospectus or are named as preparing the prospectus;⁶⁰ (b) persons who offer or sell the securities;⁶¹ and (c) persons who control the persons described in (a) and (b).⁶² Aiding and abetting liability is

57. 644 F. Supp. 1517 (C.D. Cal. 1986).

58. *Id.* at 1519 (footnotes omitted). The difficulty in expressing a wholly workable conceptual distinction contributes to dissatisfaction with the aiding and abetting cause of action. See Cheryl L. Pollak, *Rule 10b-5 Liability After Hochfelder: Abandoning the Concept of Aiding and Abetting*, 45 U. CHI. L. REV. 218, 219-20 (1977).

59. *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 494-95 (7th Cir. 1986).

60. Section 11 of the 1933 Act imposes liability when securities are sold using false or misleading documents on the issuer, members of the issuer's board of directors, persons who sign the prospectus or who are named as preparers of the prospectus, and underwriters. 15 U.S.C. § 77k (1988).

61. Section 12 of the 1933 Act imposes liability on persons who offer or sell securities which have not been properly registered or persons who offer or sell securities using false or misleading documents. *Id.* § 77l.

62. Section 15 of the 1933 Act imposes liability on persons who control other persons liable under §§ 11 and 12. *Id.* § 77o There is a parallel provision in § 20(a) of the Securities Exchange Act of 1934. *Id.* § 78t(a). "Control" under these statutes means "the practical ability to *direct* the actions of the people who issue or sell the securities." *Barker*, 797 F.2d at 494.

a proper theory for persons whose Section 10(b) liability is not predicated on acts expressly prescribed by specific statutory provisions, and who are not otherwise control persons of those primarily liable.⁶³

Thus, the Seventh Circuit distinguishes primary and aiding and abetting liability based on the role played by the defendant within the securities laws statutory scheme. This contrasts with the other circuits which distinguish primary from secondary liability based chiefly on the role the defendant played in the primary violator's fraudulent scheme.

II. ELEMENTS OF AIDING AND ABETTING LIABILITY

In light of its distinctive view on the difference between primary and secondary liability, the Seventh Circuit devised a different test for imposing Section 10(b) and Rule 10b-5 aiding and abetting liability.

A. *The Seventh Circuit Test*

In the Seventh Circuit, a person is liable as an aider and abettor of a Section 10(b) and Rule 10b-5 violation, if the plaintiff shows:

- (1) someone committed a primary violation;
- (2) in aiding this violation, the alleged aider and abettor *committed* one of the manipulative or deceptive acts proscribed by Section 10(b) and Rule 10b-5; and
- (3) did so with the same degree of scienter that is required for primary liability.⁶⁴

Before discussing the Seventh Circuit's development of its test, it is useful to first display the different test used by the other circuits.

B. *The Other Circuits*

There are two basic formulations of the test for aider and abettor liability used in the other circuits.⁶⁵ One version of the test, articulated

63. *Barker*, 797 F.2d at 495.

64. See *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1123 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *DiLeo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 947 (7th Cir. 1989); *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 932 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Barker v. Henderson, Frankin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986). The Seventh Circuit also requires that the plaintiff show more than but-for causation between the act (or failure to act) of the alleged aider and abettor and the damages suffered by the plaintiff. See, e.g., *First Interstate Bank v. Chapman & Cutler*, 837 F.2d 775, 778-80 (7th Cir. 1988).

65. For a detailed analysis of the various tests for aiding and abetting liability, see Bromberg & Lowenfels, *supra* note 10, at 651-751.

by the First, Fifth, Sixth and Eleventh circuits, requires the plaintiff to show:

- (1) someone committed a securities law violation;
- (2) the alleged aider and abettor had general awareness that his role was part of an overall improper activity; and
- (3) the alleged aider and abettor knowingly and substantially assisted the primary violation.⁶⁶

The second basic version of the test, as articulated by the Second, Third, Eighth and Tenth circuits, requires:

- (1) commission of an underlying securities law violation;
- (2) knowledge of this violation on the part of the alleged aider and abettor; and
- (3) substantial assistance in the achievement of the primary violation.⁶⁷

The first version seems to be a little more strict because of the greater knowledge requirement. The second version has been referred to as the majority rule.⁶⁸ This may be attributed to the great influence of the Seventh Circuit's *Brennan* decision, embodying the knowledge and substantial assistance model. The Seventh Circuit, because of the early *Brennan* decision, considers itself to be the home of aider and abettor liability.⁶⁹ With its new formulation of the test for Section 10(b) and Rule 10b-5 aiding and abetting liability, it has again distinguished itself among the circuits in this area of law.

66. See *Bane v. Sigmundr Exploration Corp.*, 848 F.2d 579, 581 (5th Cir. 1988); *Moore v. Fenex, Inc.*, 809 F.2d 297, 303 (6th Cir.), *cert. denied*, 483 U.S. 1006 (1987); *Woods v. Barnett Bank*, 765 F.2d 1004, 1009 (11th Cir. 1985); *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Woodward v. Metro Bank*, 522 F.2d 84, 94-95 (5th Cir. 1975); *SEC v. Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).

67. See *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 206-07 (2d Cir. 1989); *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 791 (3rd Cir. 1982), *cert. denied*, 461 U.S. 942 (1983); *Stokes v. Lokken*, 644 F.2d 779, 782-83 (8th Cir. 1981); *Edward J. Mawod & Co. v. SEC*, 591 F.2d 588, 595-96 (10th Cir. 1979); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47-48 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039 (1978); *Landy v. FDIC*, 486 F.2d 139, 162-63 (3rd Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). Additionally, the Ninth Circuit's test for aiding and abetting liability is similar. See *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982) (requiring the existence of an independent primary wrong, actual knowledge by the alleged aider and abettor of the wrong and of his or her role in furthering it, and substantial assistance in the wrong), *cert. denied*, 464 U.S. 822 (1983).

68. See *Bromberg & Lowenfels*, *supra* note 10, at 662.

69. See *DiLeo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

III. DEVELOPMENT OF THE SEVENTH CIRCUIT TEST

The basic outline of the Seventh Circuit's test, requiring that the alleged aider and abettor committed a manipulative or deceptive act with scienter, was first announced in *Barker v. Henderson, Franklin, Starnes & Holt*.⁷⁰ The court adopted these requirements out of a concern that the court should not undo, with implied causes of action, the defenses and presumptions crafted by Congress under the express civil remedies provisions of the securities laws.⁷¹ The Seventh Circuit was guided by the Supreme Court's opinions in *Ernst & Ernst v. Hochfelder*⁷² and *Herman & MacLean v. Huddleston*.⁷³

Ernst & Ernst came to the Supreme Court on appeal from the Seventh Circuit.⁷⁴ The Seventh Circuit ruled that an accounting firm could be liable as an aider and abettor of a company's securities fraud because of its failure to carry out its statutory duty of inquiry and duty of care owed to investors in that company by *negligently* performing its audit of the company's books.⁷⁵ The Supreme Court reversed, holding that Congress intended liability under Section 10(b) to attach only when persons act with an intent to deceive, manipulate or defraud (scienter).⁷⁶ Based on the *Ernst & Ernst* holding, the Seventh Circuit required proof of scienter, i.e., an intent to deceive, manipulate or defraud,⁷⁷ as an

70. 797 F.2d 490 (7th Cir. 1986). The Seventh Circuit acknowledged the three-part test used by the other circuits and referred to the elements of their test as *additional* requirements other courts have established for secondary liability. *Id.* at 496. The Seventh Circuit neither adopted the additional requirements nor, since *Barker*, analyzed an allegation of aiding and abetting under these "additional" requirements. *See Schlifke v. Seafirst Corp.*, 866 F.2d 935, 947 n.13 (7th Cir. 1989). Some district courts within the Seventh Circuit proceeded under the knowledge and substantial assistance model prior to *Barker*. *See, e.g., Delany v. Blunt, Ellis & Loewi*, 631 F. Supp. 175, 179 (N.D. Ill. 1986).

71. *Barker*, 797 F.2d at 495.

72. 425 U.S. 185 (1976).

73. 459 U.S. 375 (1983).

74. *Hochfelder v. Ernst & Ernst*, 503 F.2d 1100 (7th Cir. 1974), *rev'd*, 425 U.S. 185 (1976).

75. *Id.* at 1107.

76. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). The scienter requirement extends to Rule 10b-5 because the scope of the rule adopted by the SEC cannot exceed the power granted by Congress under § 10(b). *Id.*

77. The Seventh Circuit also permits a showing of severe recklessness to satisfy the scienter requirement, an issue which was left open in *Ernst & Ernst*. *Id.* at 193 n.12. *See Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986). The degree of reckless conduct necessary to meet the scienter standard is that "involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (quoting *Franke v. Midwestern Oklahoma Dev. Auth.*, 428 F. Supp. 719, 725 (W.D. Okla. 1976), *cert. denied*, 434 U.S. 875 (1977)).

element of aiding and abetting liability.⁷⁸

In *Herman & MacLean*, the Court held that a plaintiff having an express civil remedy under Section 11 of the 1933 Act was not prohibited from also alleging a violation of Section 10(b) against the same person for the same misrepresentations or omissions of material fact which gave rise to Section 11 liability.⁷⁹ Permitting the Section 10(b) claim in conjunction with the Section 11 claim would not nullify the "effectiveness of the carefully drawn procedural restrictions" for the express Section 11 action.⁸⁰ Because the plaintiff has a greater burden in proving a Section 10(b) violation since that claim requires proof of scienter, there is no danger that plaintiffs will use the implied private right of action under Section 10(b) to circumvent the carefully drawn presumptions of liability and defenses contained in the express remedy provisions of Section 11.⁸¹

The Seventh Circuit, by requiring proof that the defendant committed a manipulative or deceptive act, may be ensuring that plaintiffs will not use an aiding and abetting claim to circumvent the restrictions carefully drawn by the judiciary for primary violations of Section 10(b) and Rule 10b-5.⁸²

IV. APPLYING THE TESTS OF AIDING AND ABETTING LIABILITY

The Seventh Circuit's different approach goes beyond the facts that it stands alone in its conceptual distinction between primary and aiding and abetting liability and in its test for aiding and abetting liability. The type of proof required to support aiding and abetting liability is different from, and in fact more onerous on the plaintiff, than that required in the other circuits. One reason for the difference is that the other circuits view the *Ernst & Ernst* scienter requirement as susceptible to a sliding scale of required culpability depending upon the alleged aider and abettor's level and type of participation in the primary violator's fraudulent activities.⁸³ Perhaps the greatest difference between the approach of the Seventh Circuit and the other circuits is the Seventh Circuit's requirement that the alleged aider and abettor have committed one of the manipulative or deceptive acts proscribed by Section 10(b)

78. *Barker*, 797 F.2d at 495.

79. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983).

80. *Id.* at 384.

81. *Id.*

82. *See Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986).

83. *See infra* notes 102-16 and accompanying text.

and Rule 10b-5.⁸⁴ The existence of this element in the Seventh Circuit's test suggests that its theory of aiding and abetting liability is not truly a secondary liability theory at all.⁸⁵

A review of Section 10(b) and Rule 10b-5 aiding and abetting liability case law illustrates the Seventh Circuit's different approach. The following discussion presents a comparison of the Seventh Circuit's analysis of scienter to the sliding-scale scienter approach and a review of the duty of disclosure. The existence of a duty of disclosure is an extremely important factor in Section 10(b) and Rule 10b-5 aiding and abetting liability cases because quite often the sole or most prominent source of the alleged aider and abettor's liability is a failure to disclose the primary violator's fraudulent acts to the injured plaintiff.

A. *The Scienter Requirement*

The Supreme Court has held that no one is liable under Section 10(b) or Rule 10b-5 unless he acts with the requisite scienter, *i.e.*, an intent to deceive, manipulate, or defraud.⁸⁶ The Court left open whether reckless conduct could be the equivalent of intentional conduct for purposes of civil liability under Section 10(b) and Rule 10b-5.⁸⁷ The lower federal courts have determined that a severe form of reckless conduct satisfies the scienter requirement.⁸⁸

1. *Scienter in the Seventh Circuit.*—The Seventh Circuit has made it clear that the same level of scienter required for primary liability is required for aiding and abetting liability.⁸⁹ An alleged aider and abettor must have acted (or failed to act) in a reckless manner (the kind of reckless conduct that is equivalent to willful fraud) or with a specific intent to deceive, manipulate, or defraud.⁹⁰

In several recent cases, plaintiffs have brought aiding and abetting claims against attorneys and accountants based on a failure to reveal

84. See *supra* text accompanying note 64.

85. Fischel argues that aiding and abetting should no longer be recognized as a valid theory of liability because "peripheral defendants in securities cases can be liable only if they engage in a 'manipulative or deceptive' practice within the meaning of section 10(b)." Fischel, *supra* note 15, at 83.

86. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The scienter requirement also applies to SEC enforcement actions brought under § 10(b) and Rule 10b-5. *Dirks v. SEC*, 463 U.S. 646 (1983).

87. *Ernst & Ernst*, 425 U.S. at 193 n.12.

88. See, e.g., *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977).

89. See, e.g., *DiLeo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

90. *Sundstrand Corp.*, 553 F.2d at 1044 n.16, 1045.

false and misleading statements made by issuers of securities.⁹¹ Apart from the question of whether attorneys or accountants have a duty to disclose knowledge of the issuers' false statements,⁹² the claims failed because the plaintiffs did not sufficiently allege scienter. In securities fraud cases, the Seventh Circuit strictly enforces Federal Rule of Civil Procedure 9(b), which requires that circumstances constituting fraud be pleaded with particularity.⁹³ Strict application of the scienter requirement and strict enforcement of Rule 9(b) has proved too much recently for plaintiffs alleging aiding and abetting liability.

The Seventh Circuit requires that, in the absence of direct evidence that the defendant knew that the issuer was making false and misleading statements, plaintiffs demonstrate some basis for believing that the defendant intended to participate in the fraudulent acts of the issuer.⁹⁴ The question is whether there are facts from which the court could conclude that the plaintiff can show that the defendant "[threw] in his lot with the primary violators,"⁹⁵ had something to gain by bilking the plaintiffs,⁹⁶ or tried to "feather [his] nest by defrauding investors."⁹⁷ The gain must exceed the usual fees a lawyer or accountant receives for performing services for the issuer.⁹⁸

Moreover, the Seventh Circuit suggests that it is inconceivable or unreasonable that lawyers or accountants, whose greatest assets are reputations for honesty and careful work, would cover up their clients' fraud when they have nothing to gain and everything to lose by such

91. *Robin v. Arthur Young & Co.*, 915 F.2d 1120 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *Renovitch v. Kaufman*, 905 F.2d 1040 (7th Cir. 1990); *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490 (7th Cir. 1986).

92. See *infra* notes 123-40 and accompanying text.

93. To fulfill the pleading requirements under Rule 9(b), the plaintiff must allege "the who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo*, 901 F.2d at 627. Cf. *Mercer v. Jaffe, Snider, Raitt & Heuer, P.C.*, 713 F. Supp. 1019, 1026 (W.D. Mich. 1989) ("[T]he complaints do not contain a significant portion of the who, what, when, and where of each individual plaintiff's alleged defrauding. . . . [T]his court does not favor the strict application of Rule 9(b) in complex securities fraud cases."), *aff'd*, 933 F.2d 1008 (6th Cir. 1991).

94. See, e.g., *DiLeo*, 901 F.2d at 629; *Barker*, 797 F.2d at 497.

95. *DiLeo*, 901 F.2d at 629.

96. *Renovitch v. Kaufman*, 905 F.2d 1040, 1046 (7th Cir. 1990).

97. *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986).

98. *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990). The same is true in alleging indirect evidence of scienter when a bank participates in financing the issuer's investment scheme. The bank's receipt of interest payments on its loan does not "provide a sound basis for inferring an intent to deceive." *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 948 n.14 (7th Cir. 1989).

conduct.⁹⁹ The defendant's conduct must be outside of the realm of reasonable business conduct. In *DiLeo*, the court stated, "People sometimes act irrationally, but indulging ready inferences of irrationality would too easily allow the inference that ordinary business reverses are fraud. One who believes that another has behaved irrationally *has to make a strong case.*"¹⁰⁰ So far, no plaintiff has been able to meet this burden.¹⁰¹

2. *Scienter in the Other Circuits.*—*IIT v. Cornfeld*¹⁰² represents a typical analysis of the scienter requirement for aiding and abetting liability in the other circuits.¹⁰³ IIT was an investment trust in which fundholders participated in a portfolio of securities chosen and managed by related companies. The securities transactions giving rise to the fundholders' complaint ultimately bankrupted IIT. The transactions were acquisitions of common stock and debentures from companies referred to as the King complex. The principals of the King complex and IIT's management companies allegedly entered into the securities transactions as part of a scheme to defraud IIT. One of the parties alleged to have aided and abetted this scheme was the accounting firm of Arthur Andersen & Co., which had served at various times as the independent accountants for the King complex, IIT, and IIT's management companies. Arthur Andersen allegedly failed to inform regulatory authorities or fundholders of irregularities in the relationship between IIT and the King complex. An underwriting firm, who participated in the offerings of King complex common stock and debentures, allegedly aided and abetted the scheme to defraud IIT because the firm knew or should have known that the prospectus which it circulated in connection with the offerings contained certain material misrepresentations.

The court applied the knowledge and substantial assistance model in analyzing whether the accountants or underwriters possessed the necessary degree of scienter. The court viewed knowledge of the primary violation as a scienter equivalent.¹⁰⁴ Scienter is also a function of the

99. See *DiLeo*, 901 F.2d at 629; *Barker*, 797 F.2d at 497.

100. *DiLeo*, 901 F.2d at 629 (emphasis added).

101. *Robin v. Arthur Young & Co.*, 915 F.2d 1120 (7th Cir. 1990) (affirming dismissal of complaint against accounting firm), *cert. denied*, 111 S. Ct. 1317 (1991); *Renovitch v. Kaufman*, 905 F.2d 1040 (7th Cir. 1990) (affirming summary judgment in favor of lawyers); *DiLeo*, 901 F.2d at 626 (affirming dismissal of complaint against accounting firm); *Barker*, 797 F.2d at 497 (affirming summary judgment in favor of law firm and accounting firm).

102. 619 F.2d 909 (2d Cir. 1980).

103. *Id.* See also *Woods v. Barnett Bank*, 765 F.2d 1004, 1010 (11th Cir. 1985); *Metge v. Baehler*, 762 F.2d 621, 624 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 799 (3rd Cir.), *cert. denied*, 439 U.S. 930 (1978); *Woodward v. Metro Bank*, 522 F.2d 84, 93 (5th Cir. 1975).

104. *Cornfeld*, 619 F.2d at 922.

interplay between knowledge of the primary violation and substantial assistance in the achievement of the primary violation.¹⁰⁵ The existence or nonexistence of a fiduciary duty between the alleged aider and abettor and the defrauded party is also critical to the analysis.¹⁰⁶

Several degrees of required scienter result. The degree of scienter depends on whether the alleged aider and abettor owes a fiduciary duty, whether his activities seem remote, and whether his liability is based primarily on inaction, i.e., his failure to disclose known wrongs. Thus: (1) reckless conduct will satisfy the scienter requirement when the alleged aider and abettor owes a fiduciary duty to the defrauded party;¹⁰⁷ (2) when there is no fiduciary duty, and the activities of the alleged aider and abettor are remote to the primary violator's fraudulent activities, the "scienter requirement scales upward so that the assistance rendered should be both substantial and knowing";¹⁰⁸ (3) when there is no duty of disclosure, the alleged aider and abettor "should be found liable only if scienter of the high 'conscious intent' variety can be proved";¹⁰⁹ and (4) inaction or a failure to disclose can constitute substantial assistance (a) when there is no fiduciary relationship between the aider and abettor and the defrauded party only if something close to an actual intent to aid in the fraud is proven,¹¹⁰ or (b) when there is a "conscious or reckless violation of an independent duty to act."¹¹¹

Applying these rules, the court held the complaint insufficient as to Arthur Andersen because its failure to disclose was a remote activity and the complaint did not indicate that Arthur Andersen acted with scienter of the high conscious intent variety.¹¹² Further, since Arthur Andersen did not have an independent duty to act, its inaction did not support a claim of aiding and abetting because there was no showing of an actual intent to aid in the fraud.¹¹³ The complaint against the underwriters was upheld because the plaintiff alleged that the underwriters knew of the misrepresentations contained in the prospectus. The underwriter's actual knowledge satisfied the scienter requirement.¹¹⁴

By using knowledge and, sometimes, an interplay of knowledge and substantial assistance, as substitutes for scienter, parties can be held

105. *Id.*

106. *Id.*

107. *Id.* at 923.

108. *Id.*

109. *Id.* at 925 (quoting *Woodward v. Metro Bank*, 522 F.2d 84, 97 (5th Cir. 1975)).

110. *Id.* at 926.

111. *Id.* at 927.

112. *Id.* at 925.

113. *Id.* at 927.

114. *Id.* at 924.

liable as aiders and abettors to securities fraud even though there is no showing of an *Ernst & Ernst* intent to deceive, manipulate, or defraud.¹¹⁵ The Ninth Circuit acknowledged that the knowledge and substantial assistance test is less stringent than a test requiring proof of an alleged aider and abettor's intent to deceive or defraud.¹¹⁶

B. *The Duty to Disclose*

In *Chiarella v. United States*,¹¹⁷ the Supreme Court held that a failure to disclose material facts in connection with the purchase or sale of a security is not actionable fraud under Section 10(b) and Rule 10b-5 unless the defendant had a duty to disclose those facts.¹¹⁸

The duty to disclose does not arise from merely possessing material information, nor does it arise merely because one party has superior information or superior access to information.¹¹⁹ The duty of disclosure arises from a relationship between two persons, such as an agent-principal relationship, a fiduciary relationship, or a relationship of trust and confidence that arose between the parties because of their prior dealings.¹²⁰

As provided in Rule 10b-5, a duty of disclosure also arises when it is necessary to disclose a material fact in order to make statements already made, in light of the circumstances in which they were made, not misleading.¹²¹ This duty of disclosure prohibits incomplete disclosures or half-truths.¹²²

Thus, under Section 10(b) and Rule 10b-5, apart from the necessity to correct half-truths and absent a fiduciary-type relationship, the failure to disclose material facts in connection with a securities transaction is not a manipulative or deceptive act. The remaining discussion concerning the duty of disclosure assumes that the alleged aider and abettor has not made an incomplete disclosure which is necessary for him to correct.

1. *The Duty of Disclosure For Aiding and Abetting Liability in the Seventh Circuit.*—Because a failure to disclose material facts absent a

115. *Edward J. Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *Morgan v. Prudential Group, Inc.*, 527 F. Supp. 957, 959 (S.D.N.Y. 1981), ("[T]he question here is not truly one of 'state of mind' — *i.e.*, not one of intent, attitude, motive, point of view — but rather whether defendants actually had knowledge. . . ."), *aff'd mem.*, 729 F.2d 1443 (2d Cir. 1983).

116. *Orloff v. Allman*, 819 F.2d 904, 907 (9th Cir. 1987).

117. 445 U.S. 222 (1980).

118. *Id.* at 232.

119. *Id.* at 228 & nn.9-10.

120. *Id.* at 232.

121. 17 C.F.R. § 240.10b-5(b) (1991).

122. *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 944 (7th Cir. 1989).

duty to do so is not a manipulative or deceptive act, plaintiffs who allege that a defendant is liable as an aider and abettor because of a failure to disclose known misrepresentations made by the primary violator must show that the defendant owed the plaintiff a duty of disclosure.¹²³ Further, the duty of disclosure does not come from Section 10(b) or Rule 10b-5, but must come from some type of fiduciary relationship outside of the securities laws.¹²⁴

Plaintiffs' claims of aiding and abetting liability against attorneys and accountants who had some relationship with the primary violator have failed not only because the plaintiffs have been unable to establish scienter. A duty of disclosure has also been lacking. Even if the plaintiffs could have shown the defendants' knowledge of the primary violator's fraud and intent to further that fraud by remaining silent, the plaintiffs have been unable to establish that the defendants owed them a duty to disclose misrepresentations made by the primary violator.¹²⁵ The Seventh Circuit has termed these types of cases as attempts to invoke a "theory of whistle blower liability."¹²⁶

For accountant-defendants, the Seventh Circuit has declined to impose "financial good Samaritanism."¹²⁷ In *DiLeo v. Ernst & Young*,¹²⁸ investors in Continental Illinois Bank alleged that Continental's auditors aided and abetted Continental's employees' securities fraud by "lending its name to [Continental's] financial statements and keeping its mouth shut about what was really going on."¹²⁹

In analyzing whether the auditors had a duty of disclosure, the court decided that under the applicable Illinois law, the accountants had no duty "to search and sing"¹³⁰ beyond the duty to exercise care in rendering their opinion on the accuracy and adequacy of Continental's financial statements. The court expressed concern that imposing a greater duty on auditors would hinder the relationship of trust between auditors and

123. *Id.* at 948.

124. *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496 (7th Cir. 1986).

125. See *Robin v. Arthur Young & Co.*, 915 F.2d 1120 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *Renovitch v. Kaufman*, 905 F.2d 1040 (7th Cir. 1990); *DiLeo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990); *Latigo Ventures v. Laventhol & Horwath*, 876 F.2d 1322, 1326 (7th Cir. 1989); *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 932 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Barker*, 797 F.2d at 497.

126. *Latigo Ventures*, 876 F.2d at 1326.

127. *Id.*

128. 901 F.2d 624 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

129. *Id.* at 628.

130. *Id.* at 629.

their clients, and would adversely affect the reliability of audited financial statements in general.¹³¹

Further, making auditors choose between disclosing or paying damages would raise the costs of all audits.¹³² Investors would eventually be the losers as companies purchased fewer auditing services.¹³³ These same practical concerns of destroying the relationship of trust between an accountant and his client and increasing auditing costs as accountants passed on to their clients their risk of securities fraud liability prompted the Seventh Circuit in *Latigo Ventures v. Laventhol & Horwath*,¹³⁴ to decline to impose a general duty of disclosure on accountants.¹³⁵

The Seventh Circuit has also declined to recognize any duty upon lawyers to "tattle on their clients."¹³⁶ Thus, lawyers do not participate in a client's fraudulent scheme by remaining silent and failing to disclose to potential investors that the client is issuing securities using false and misleading material statements.¹³⁷ Lawyers have privileges and duties not to disclose.¹³⁸

The Seventh Circuit's refusal to impose a duty on lawyers to disclose known fraudulent activities to persons with whom they are not in a fiduciary relationship or even to the SEC may seem to unduly forgo an effective deterrent to securities fraud. Lawyers, because of their access to information and knowledge of securities laws requirements, may be in unique positions to aid the integrity of securities markets. However, the Seventh Circuit has concluded that "an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions. Liability depends on an *existing* duty to disclose. The securities law therefore must lag behind changes in ethical and fiduciary standards."¹³⁹ The Supreme Court recognized the same dilemma: "In a statutory area of law such as securities regulation . . . there may be 'significant distinctions between

131. *Id.*

132. *Id.*

133. *Id.*

134. 876 F.2d 1322 (7th Cir. 1989).

135. *Id.* at 1327.

136. *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986).

137. *Id.* at 497; *Renovitch v. Kaufman*, 905 F.2d 1040, 1048 (7th Cir. 1990). See also *Ackerman v. Schwartz*, 733 F. Supp. 1231 (N.D. Ind. 1989) (discussing lawyer's duties under Indiana law to persons with whom he is not in privity), *appeal dismissed mem.*, 922 F.2d 843 (7th Cir. 1991).

138. *Barker*, 797 F.2d at 497 (citing *Upjohn Corp. v. United States*, 449 U.S. 383 (1981)).

139. *Id.*

actual legal obligations and ethical ideals.”¹⁴⁰ In contrast, the other circuits attempt to close the gap between ethical ideals and legal obligations by creating additional legal obligations to disclose.

2. *The Duty of Disclosure For Aiding and Abetting Liability in Other Circuits.*—The other circuits have rejected arguments that the duty of disclosure must be analyzed under *Chiarella*.¹⁴¹ The knowledge and substantial assistance model provides its own duty of disclosure. The duty arises in the aiding and abetting context from the alleged aider and abettor’s knowing assistance or participation in the underlying securities fraud violation without regard to the aider and abettor’s relationship with the deceived investor.¹⁴²

In *Roberts v. Peat, Marwick, Mitchell & Co.*,¹⁴³ an accounting firm prepared audited financial statements of the issuer of securities. The financial statements were included in an offering memorandum distributed to investors. The complaint alleged that the accounting firm knew that portions of the offering memorandum, excluding the financials, were false, and participated in the fraud by permitting its name to be included in the offering memorandum. The court ruled that these allegations of knowledge and participation in the offering created a duty to disclose by the accounting firm, stating that “investors can reasonably be expected to assume that an accounting firm would not consent to the use of its name on reports and offering memoranda it knew were fraudulent.”¹⁴⁴

The Eleventh Circuit similarly held that an accountant cannot stand idly by “knowing one’s good name is being used to perpetrate a fraud.”¹⁴⁵ An accountant has a special relationship of trust with the public and this duty extends to safeguard the public interest. An accountant who knows that a prospectus contains false statements, with which its audited financial statements are a part, owes a duty to disclose the client’s fraud.¹⁴⁶

By rejecting the *Chiarella* fiduciary relationship test for finding a duty of disclosure, the other circuits have maintained their division

140. *Dirks v. SEC*, 463 U.S. 646, 661 n.21 (1983) (quoting SEC REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. NO. 95, 88th CONG., 1st SESS. 237-38 (1963)).

141. See, e.g., *Harmesen v. Smith*, 693 F.2d 932, 944 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1368 (D. Conn. 1987).

142. *Harmesen*, 693 F.2d at 944; *In re National Smelting of N.J., Inc. Bondholders’ Litigation*, 722 F. Supp. 152, 174 (D.N.J. 1989); *SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 68 (D. Conn. 1988), *aff’d*, 891 F.2d 457 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 3228 (1990).

143. 857 F.2d 646 (9th Cir. 1988), *cert. denied*, 493 U.S. 1002 (1989).

144. *Id.* at 653.

145. *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1044 (11th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

146. *Id.*

between primary liability and aiding and abetting liability under Section 10(b) and Rule 10b-5. Thus, defendants in Section 10(b) and Rule 10b-5 securities fraud cases can be found not liable as a primary violator because they did not owe a duty of disclosure under the *Chiarella* test but liable for aiding and abetting for failure to disclose.¹⁴⁷

V. CONCLUSION

The judge-made cause of action of aiding and abetting Section 10(b) and Rule 10b-5 securities fraud has undergone such fundamental change in the Seventh Circuit that it has all but been eliminated. Under the Seventh Circuit's modern test, aiding and abetting securities fraud is arguably not a secondary liability theory at all, but merely bears the label. The Seventh Circuit discarded the knowledge and substantial assistance model of aiding and abetting liability which it adopted over twenty years ago, and which spurred wide recognition in the federal circuit courts of such a cause of action. It remains to be seen whether the Seventh Circuit will again spur change in this area of the law.

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147. See *Harmsen v. Smith*, 693 F.2d 932, 944 (9th Cir. 1982) (A contention that the alleged aider and abettor owes no duty of disclosure under *Chiarella* "blurs the distinction between primary and secondary violations of section 10(b)."). See also *Martin v. Pepsi-Cola Bottling Co.*, 639 F. Supp 931, 935-36 (D. Md. 1986).

A Proposal for State Regulation of Physicians' Office Procedures: Expanding the Reach of the Clinical Laboratory Improvement Amendments

I. QUALITY ASSURANCE AND THE NEED FOR REGULATION OF PHYSICIANS' OFFICE PROCEDURES

Mary Smith is forty-five years old. After experiencing intermittent sharp abdominal pain for one week, she went to see her family physician, Dr. Jones. Dr. Jones examined Ms. Smith and performed an electrocardiogram (EKG) and a chest X-ray. Because Dr. Jones did not find the source of Ms. Smith's pain, he recommended that she return to the office in three days for an abdominal ultrasound. Ms. Smith continued to have pain. She returned in three days, and Dr. Jones's office staff performed the ultrasound. Unfortunately, Dr. Jones still did not find the source of Ms. Smith's pain.

Dr. Jones next recommended that Ms. Smith return to the office in two days for a cholecystogram, or gallbladder X-ray. Ms. Smith returned in two days, and Dr. Jones's office staff performed the cholecystogram. Again, Dr. Jones did not find the problem. That night, Ms. Smith experienced excruciating abdominal pain. She went to a local hospital emergency room. At the emergency room, a physician found that Ms. Smith's gallbladder was infected and inflamed. The infection had also spread to her abdominal wall causing peritonitis. A surgeon removed Ms. Smith's gallbladder. Ms. Smith stayed in the hospital beyond her expected recovery time to receive intravenous antibiotics.

Ms. Smith lost over three weeks of work and suffered extreme pain. She is angry that, after three office visits, Dr. Jones did not find the source of her pain. She hired an attorney, and intends to sue Dr. Jones for negligently performing the ultrasound and cholecystogram. Unfortunately, the state where Ms. Smith and Dr. Jones live does not have a statute regulating physicians' office procedures. In fact, no state has such a statute. If such a statute existed, Ms. Smith could check with a regulatory committee to determine whether Dr. Jones registered his office to perform diagnostic procedures. Dr. Jones could also prove that he meets the state's requirements for performing procedures in his office.

Like Ms. Smith, consumers demand quality health care. Yet, physicians, not health care consumers, control health services delivery.¹ One

1. See Alexander M. Capron, *Containing Health Care Costs: Ethical and Legal Implications of Changes in the Methods of Paying Physicians*, 36 CASE W. RES. L. REV.

commentator stated, "In their office practice [physicians] view themselves as individual entrepreneurs, solely responsible to themselves for the diagnosis and treatment of patients."² When physicians fail to provide quality care, the state must regulate their behavior.

This Note proposes state regulation of physicians' office procedures. Part I describes physician control in health care and the quality of care provided in physicians' offices. Part I also describes the current increase in outpatient services and physicians' office procedures. Part II describes federal and state laws designed to ensure medical care quality and safety. Part III discusses why state legislatures are the appropriate forum for implementing physicians' office procedure regulations. Finally, Part IV proposes a statute for the regulation of physicians' office procedures to ensure quality and safety for health care consumers.

A. Physician Control in the Health Care Field

Physicians benefit from professional autonomy and self-regulation. Physicians regulate themselves through education, socialization, certification, and accreditation.³ This self-regulation tends to be based on limited clinical studies, unverified beliefs about treatment methodologies, and professional traditions, rather than empirical data.⁴ As a result, standards based on scientific evidence are not available to settle disputes over medical treatment methods.⁵ Because physicians define and apply their own standards, they cannot know how their colleagues treat patients in their offices. Unfortunately, office practices that do not meet a reasonable standard of care are usually not discovered until after a

708, 734 (1986) (the consumer selects a physician who makes choices for him); Gail R. Wilensky & Louis F. Rossiter, *The Relative Importance of Physician-Induced Demand in the Demand for Medical Care*, 61 MILBANK MEMORIAL FUND Q. 252, 271 (1983) ("The less the individual pays for medical care, the more likely is the physician to initiate visits and related expenditures."); Bruce A. Hunter, Recent Case, 52 U. CIN. L. REV. 253, 262 n.79 (1983) (the demand for health care services is often controlled by providers). But see Roger Feldman & Frank Sloan, *Competition Among Physicians, Revisited*, 13 J. HEALTH POL. POL'Y & L. 239, 258 (1988) (physicians do not generate demand to avoid price controls).

2. Richard L. Johnson, *Revisiting "The Wobbly Three Legged Stool"*, in HOSPITAL ORGANIZATION AND MANAGEMENT 38, 43 (Kurt Darr & Jonathan S. Rakich eds., 4th ed. 1989).

3. Timothy S. Jost, *The Necessary and Proper Role of Regulation to Assure the Quality of Health Care*, 25 HOUS. L. REV. 525, 535 (1988) [hereinafter Jost, *Regulation*].

4. See Richard E. Leahy, *Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines*, 77 CALIF. L. REV. 1483, 1484 (1989).

5. Mary T. Koska, *Hospital, Patient Input Key to Quality Reforms*, HOSPITALS, Oct. 20, 1989, at 77, 77.

patient is harmed.⁶ Physicians with minimal qualifications are more likely to harm patients within their offices because an office is not a regulated setting. Consequently, state legislation to regulate physicians' office procedures will help to identify physicians who deviate from accepted practices.

B. *Defining Quality Health Care*

State legislatures cannot implement effective quality standards for physicians' office procedures without first defining the word quality. Quality is a term that is difficult to define, particularly in the health care field.⁷ To define quality care, medical professionals have used outcome standards which measure patient care results.⁸ These standards are guidelines for treatment, documentation, and evaluation.⁹

Mortality and severity-adjusted death rates are widely accepted outcome standards;¹⁰ however, outcome standards also include "patient response in terms of . . . symptoms, ability to work or perform daily activities, and physiologic measurements."¹¹ For example, the expected outcomes for a gallbladder surgery patient include the absence of pain or pneumonia and the ability to return to work, to ambulate, and to eat.¹² State legislatures can help to ensure quality by incorporating outcome standards into physicians' office procedure regulations.

C. *The Movement Toward Increased Outpatient Services*

Regulating physicians' office procedures is important because medical services are increasingly provided outside the inpatient hospital setting.¹³

6. See *Voss v. Adams*, 259 N.W. 889 (Mich. 1935) (patient suffered surgical shock and was left alone after he had 16 teeth extracted); *Barbire v. Wry*, 183 A.2d 142 (N.J. Super. Ct. App. Div. 1962) (physician lost the tip of an irrigating syringe in the patient's ear).

7. AVEDIS DONABEDIAN, *THE METHODS AND FINDINGS OF QUALITY ASSESSMENT AND MONITORING: AN ILLUSTRATED ANALYSIS* 4 (1985); Koska, *supra* note 5, at 77.

8. Robert H. Brook & Francis A. Appel, *Quality-of-Care Assessment: Choosing a Method for Peer Review*, 288 NEW ENG. J. MED. 1323, 1323 (1973).

9. See Stephen Morgenstein et al., *Development of a Quality Assurance Program as an Integral Part of the Physical Therapy System*, 62 PHYSICAL THERAPY 464, 464 (1982).

10. Sandra R. Edwardson, *Revision and Testing of the Haressman and Hegyvary Outcome Measure for Myocardial Infarction*, in MEASUREMENT OF NURSING OUTCOMES 24 (Carolyn F. Waltz & Ora Strickland eds., 1988).

11. *Id.* at 25.

12. See JOAN LUCKMANN & KAREN C. SORENSEN, *MEDICAL-SURGICAL NURSING: A PSYCHOPHYSIOLOGIC APPROACH* 1520-21 (2d ed. 1980).

13. Barry R. Furtow, *The Changing Role of the Law in Promoting Quality in Health Care: From Sanctioning Outlaws to Managing Outcomes*, 26 Hous. L. REV. 147, 154 (1989); James S. Roberts, *Reviewing the Quality of Care: Priorities for Improvement*, HEALTH CARE FINANCING REV. 69, 69 (Annual Supp. 1987).

The movement from inpatient to outpatient services resulted from changes in provider reimbursement. Today's increase in outpatient services began when Congress amended the Medicare statute in 1983 to include a prospective payment system.¹⁴ Medicare's prospective payment system consists of 470 Diagnostic Related Groups (DRGs).¹⁵ Under this reimbursement system, each hospitalized Medicare patient is assigned a DRG that is based on the average cost of his principal diagnosis.¹⁶ DRG reimbursement rates, however, do not include actual patient costs.¹⁷ If the patient's costs exceed the reimbursement rate, the hospital must absorb the cost.¹⁸ If the patient's costs are below the reimbursement rate, the hospital may keep the excess.¹⁹ As a result, Medicare's prospective payment system creates an incentive for hospitals to absorb excess reimbursements by decreasing lengths of stay.²⁰

As hospitals attempt to decrease inpatient lengths of stay, physicians have an incentive to treat more patients in outpatient settings. For example, cholecystograms once performed in the hospital, are now performed in outpatient settings. As a result, prospective payment creates

14. 42 U.S.C. § 1395ww (1988 & Supp. I 1989). *See generally* 48 Fed. Reg. 39,755 - 39,792 (1983) (summary of the Medicare Prospective Payment System as it was originally enacted).

15. 42 U.S.C. § 1395ww. *See generally* H. Lynda Kugel, Note, *The Medicare Rx: Prospective Pricing to Effect Cost Containment*, 19 U. MICH. J.L. REF. 743 (1986); Diana Vance-Bryan, Note, *Medicare's Prospective Payment System: Can Quality Care Survive?*, 69 IOWA L. REV. 1417 (1984); 1 Medicare & Medicaid Guide (CCH) ¶¶ 4203-4246.280 (1986).

16. 42 C.F.R. §§ 412.1 to -.10 (1990). Before the prospective payment system was introduced, Medicare reimbursed hospitals retroactively based on the actual cost of care provided to the patient. *See* Vance-Bryan, *supra* note 15, at 1417-18.

17. *See* 42 U.S.C. § 1395ww (1988 & Supp. I 1989); 42 C.F.R. §§ 412.1 to -.280 (1990); Susan C. Atkinson, Note, *Medicare "Cost Containment" and Home Health Care: Potential Liability for Physicians and Hospitals*, 21 GA. L. REV. 901, 902 (1987); Kugel, *supra* note 15, at 745-46.

18. Vance-Bryan, *supra* note 15, at 1420. *See also* Office of National Cost Estimates, *National Health Expenditures, 1988*, HEALTH CARE FINANCING REV., Summer 1990, at 1, 10 (one American Hospital Association panel study revealed that inpatient days decreased 16% between 1983 and 1988).

19. *See* Office of National Cost Estimates, *supra* note 18, at 9-10; Vance-Bryan, *supra* note 15, at 1420.

20. Office of National Cost Estimates, *supra* note 18, at 9. A hospital can receive reimbursement for "outliers" requiring longer lengths of stay, but specific criteria must be met. 42 U.S.C. § 1395ww(d)(5)(A)(i) (1988 & Supp. I 1989); 42 C.F.R. §§ 412.80 to -.86 (1990). *See also* Paul W. Eggers, *Prospective Payment System and Quality: Early Results and Research Strategy*, HEALTH CARE FINANCING REV. 29, 30 (Annual Supp. 1987); Dorothy R. Gregory, *DRGs: How the Government Requires You to Impose Life-Threatening Medical Restrictions*, LEGAL ASPECTS MED. PRAC., March 1986, at 1, 2 (1986); Atkinson, *supra* note 17, at 909.

a greater demand for physicians who perform procedures outside the hospital.²¹

Although prospective payment encourages outpatient care, Certificate of Need (CON) laws may impede outpatient service growth. Amendments to the National Health Planning and Resources Development Act of 1974 (NHPDA)²² established state certificate of need programs which required state legislatures to determine the need for medical equipment and capital expenditures.²³ State legislatures made these determinations by reviewing capital expenditure proposals that exceeded a statutory threshold.²⁴

Although Congress repealed the amendments that required certificate of need programs,²⁵ thirty-two states continue to review at least some health care expenditures.²⁶ Nineteen of these states specifically exclude

21. Physician contacts in settings outside the hospital increased 10.7% from 1983 to 1987. Furthermore, data from the Bureau of Labor Statistics show that employment in physicians' offices has grown since 1983. Office of National Cost Estimates, *supra* note 18, at 10. From this data one can infer that consumers are decreasing their use of hospital in-patient services. In addition, the proposed relative value scale for paying physicians under the Medicare program could lead to higher payments to physicians who perform procedures in their offices. See Fee Schedule for Physicians' Services, 56 Fed. Reg. 25,792 (1991) (to be codified at 42 C.F.R. pts. 405, 415).

22. 42 U.S.C. §§ 300k-1 - 300n-6 (repealed 1987).

23. *Id.* § 300m-6 (repealed 1987). See generally Roberta M. Roos, Note, *Certificate of Need for Health Care Facilities: A Time for Re-Examination*, 7 PACE L. REV. 491 (1987).

24. Capital expenditure thresholds vary from \$1,000,000 to \$4,000,000. Medical equipment thresholds range from \$400,000 to \$2,000,000. See Edward F. Shay, *Developments in Certificate of Need*, in HEALTH LAW HANDBOOK 187, 194-99 (Alice G. Gosfield ed., 1989).

25. 42 U.S.C. §§ 300k-1 - 300n-6 (repealed 1987).

26. See ALA. CODE §§ 22-21-260 to -276 (1990); ALASKA STAT. §§ 18.07.031 to -.111 (1986); ARK. CODE ANN. §§ 20-8-101 to -110 (Michie 1987 & Supp. 1991); CONN. GEN. STAT. ANN. § 19a-155 (West 1986 & Supp. 1991); DEL. CODE ANN. tit. 16, §§ 9301 - 9310 (1983 & Supp. 1990); GA. CODE ANN. §§ 31-6-40 to -50 (Michie 1991); HAW. REV. STAT. §§ 323D-41 to -54 (1991); ILL. ANN. STAT. ch. 111 1/2, para. 1153.1 (Smith-Hurd 1988); IOWA CODE ANN. § 135.63 (West 1989 & Supp. 1991); ME. REV. STAT. ANN. tit. 22, §§ 301 - 303 (West 1980 & Supp. 1991); MD. HEALTH-GEN. CODE ANN. § 19-115 (1990 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 111, §§ 25B, 25C (West 1983 & Supp. 1991); MINN. STAT. ANN. §§ 144.551, 144A.071 (West 1989 & Supp. 1991) (moratorium on construction of hospitals and nursing home beds); MISS. CODE ANN. §§ 41-7-171 to -209 (1980 & Supp. 1991); MO. REV. STAT. §§ 197.300 to -.365 (1983 & Supp. 1991); MONT. CODE ANN. §§ 50-5-301 to -317 (1991); NEB. REV. STAT. §§ 71-5801 to -5872 (1990); NEV. REV. STAT. ANN. §§ 439A.010 - 439A.120 (Michie 1987); N.H. REV. STAT. ANN. §§ 151-C:1 to -C:15 (1990 & Supp. 1991); N.J. STAT. ANN. §§ 26:2H-1 to -18.3 (West 1987 & Supp. 1991); N.Y. PUB. HEALTH LAW § 2802 (Consol. 1985 & Supp. 1991); N.C. GEN. STAT. §§ 131E-175 to -190 (1988); N.D. CENT. CODE § 23-17.2-01 to -15 (1991); OKLA. STAT. ANN. tit. 63, §§ 1-851 to -860 (West 1984 & Supp. 1991); 35

physicians' offices from at least part of their certificate of need statutes.²⁷ In these states, physicians can purchase diagnostic equipment without state review.²⁸ Consequently, physicians can compete with hospitals to provide diagnostic services that once required inpatient care. For example, if Dr. Jones practices in a state with a certificate of need statute that excludes private physicians or that has a high medical equipment threshold, Dr. Jones may purchase a variety of medical equipment for his office. Likewise, if the state where Dr. Jones practices does not have a certificate of need statute, Dr. Jones can purchase any medical equipment that he would like to use in his office and that he can afford.

Yet, the use of medical equipment by private physicians is not always beneficial to patients. Medical practice is based on the philosophy that patients should receive all treatments of any conceivable benefit in an

PA. CONS. STAT. ANN. §§ 448.701 to -.712 (Supp. 1991); R.I. GEN. LAWS §§ 23-15-1 to -9 (1989 & Supp. 1991); S.C. CODE ANN. §§ 44-7-110 to -460 (Law. Co-op. 1985 & Supp. 1990); TENN. CODE ANN. §§ 68-11-101 to -113 (1987 & Supp. 1991); TEX. HEALTH & SAFETY CODE ANN. § 225.001 to -.005 (West Supp. 1991); VT. STAT. ANN. tit. 18, §§ 2400 - 2416 (1982 & Supp. 1991); VA. CODE ANN. §§ 32.1-102.1 to -102.11 (Michie 1985 & Supp. 1991); W. VA. CODE §§ 16-2D-1 to -15 (1991). Arizona, California, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Michigan, New Mexico, Ohio, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming have repealed their CON laws.

27. ALA. CODE § 22-21-260(5) (1990); ALASKA STAT. § 18.07.111 (1986); DEL. CODE ANN. tit. 16, § 9302 (1983 & Supp. 1990); HAW. REV. STAT. § 323D-54 (1991); ILL. ANN. STAT. ch. 111 1/2, para. 1153 (Smith-Hurd 1988 & Supp. 1991); ME. REV. STAT. ANN. tit. 22, § 303 (West 1980 & Supp. 1989) (private physicians excluded from the definition of ambulatory surgical facility for certificate of need purposes); MD. HEALTH-GEN. CODE ANN. § 19-101(e)(2)(v)(1) (1990 & Supp. 1991); MISS. CODE ANN. § 41-7-173(9) (1980); MO. REV. STAT. § 197.305(7) (1983 & Supp. 1991); MONT. CODE ANN. § 50-5-101 (1991); NEB. REV. STAT. § 71-5810 (1990); NEV. REV. STAT. ANN. § 439A.015 (Michie 1987); N.H. REV. STAT. ANN. § 151-C:2 (1990) (ambulatory surgical facilities); N.C. GEN. STAT. § 131E-176 (1988) (ambulatory surgical facilities); 35 PA. CONS. STAT. ANN. § 448.103 (Supp. 1991); R.I. GEN. LAWS § 23-15-2(5) (1989 & Supp. 1991); TENN. CODE ANN. § 68-11-102 (1987 & Supp. 1991); VT. STAT. ANN. tit. 18, § 2401(1) (1982 & Supp. 1991) (ambulatory surgical facilities); W. VA. CODE § 16-2D-2(b) (1991) (ambulatory health care facilities). *But see* IOWA CODE ANN. § 135.61 (West 1989) (emphasis added) which provides:

(19) "New institutional health service" or "changed institutional health service" means any of the following: . . .

(g) Any expenditure by or on behalf of an individual health care provider or group of health care providers, in excess of four thousand dollars, made for the purchase or acquisition of a single piece of new equipment which is to be installed and used *in a private office or clinic*, and for which a certificate of need would be required if the equipment were being purchased or acquired by an institutional health facility or health maintenance organization, and which is, under generally accepted accounting principles consistently applied, a capital expenditure.

28. *See generally* Roos, *supra* note 23.

attempt to achieve a cure.²⁹ Consequently, a physician may be tempted to use a new technology without achieving proficiency with the procedure. Furthermore, when physicians perceive that liability may result from failure to perform procedures, they will increase the number of procedures they perform to avoid lawsuits.³⁰ This practice, known as defensive medicine, results in unnecessary procedures and increased health care costs.³¹ The regulation of physicians' office procedures will deter physicians from performing procedures simply to diminish a perceived legal threat. These regulations will require physicians to provide documentation supporting the procedure performed and will mandate certain safety and hygiene requirements. Physicians will then be able to prove that certain minimum standards were met, thereby decreasing their perceived liability.

II. CURRENT METHODS OF QUALITY AND SAFETY CONTROL

A. *The Need for Governmental Regulation*

Although a physician may be liable for failure to perform appropriate diagnostic or therapeutic procedures, courts have also reasoned that a physician's medical judgment should be protected from state and organizational interference.³² Courts have reasoned that interfering with medical judgment is inappropriate because physicians are better qualified to make medical progress and risk determinations.³³ This reasoning implies

29. Mark A. Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 435 (1988).

30. See *Helling v. Carey*, 519 P.2d 981, 983 (Wash. 1974) (physician held liable for failing to perform glaucoma test).

31. Americans spend an estimated \$27 billion each year on lab tests, \$2 billion on chest X-rays, and \$1 billion on EKGs. Twenty to sixty percent of these tests are unnecessary. Paula Dranov, *The Medical Test Mess: How Many Screening Procedures Are Too Many?*, 20 HEALTH 69, 69 (1988).

32. See *United States v. Evers*, 453 F. Supp. 1141, 1150 (N.D. Ala. 1978) (FDA not empowered to limit physicians' ability to prescribe); *People v. Privitera*, 141 Cal. Rptr. 764, 774 (1977), *vacated*, 591 P.2d 919 (1979), *cert. denied*, 444 U.S. 949 (1979) (physician cannot be required to use only "state sanctioned" treatment methods); *Radiology Professional Corp. v. Trinidad Area Health Ass'n*, 577 P.2d 748, 751 (Colo. 1978) ("The ability of a physician to exercise his professional judgment in the diagnosis and care of his patients is well-established and should be protected against unreasonable interference."); *State ex rel. Walker v. Bergman*, 755 P.2d 557, 560 (Kan. Ct. App. 1988) (facility may coordinate and monitor patient care, but it does not have supervisory authority over the physician). See also Hall, *supra* note 29, at 467 ("From several sources in the law there is evident a nascent principle that potentially insulates individual clinical decisions from nonmedical interference of any source or magnitude.").

33. See *Evers*, 453 F. Supp. at 1144 (the decision to inform a patient of the risks associated with a drug must be made by the physician); *Privitera*, 141 Cal. Rptr. at 773 ("treating doctor . . . is at the cutting edge of medical knowledge").

that governmental agencies should also refrain from making quality of care determinations.³⁴ Consequently, legislators must decide whether physicians should continue to determine their own standards.³⁵ If a state legislature chooses to regulate physicians' office procedures, it should enact statutes that are broad enough to allow physicians to practice medicine without excessive restraint, but are also narrow enough to limit physician behavior within appropriate parameters. In addition, because consumers pay for health care through taxes and insurance premiums, they expect effective and appropriate medical care.³⁶ Governmental regulation will ensure that physicians will not perform procedures when the potential benefit to the patient is outweighed by the risk that the physician will not perform the procedure skillfully.³⁷ Overall, state regulation should reflect consumers' expectations for quality care in all health care settings, including the physician's office.

B. The Clinical Laboratory Improvement Amendments of 1988

The Clinical Laboratory Improvement Act (CLIA) is the only significant regulation of physician behavior in the office setting.³⁸ Between four and six billion laboratory tests are performed each year at an annual cost of twenty to twenty-five billion dollars.³⁹ Improperly performed laboratory tests may result in improper treatment, increased patient anxiety, and higher health costs.⁴⁰ Congress enacted CLIA to ensure that patients are provided with accurate laboratory results.⁴¹

In 1988, Congress passed the Clinical Laboratory Improvement Amendments (Amendments) to modify CLIA.⁴² Congress passed the

34. See Roberts, *supra* note 13, at 69 ("the responsibility for assuring the quality of care rests with the organization providing that care").

35. See Robert C. Clark, *Why Does Health Care Regulation Fail?*, 41 MD. L. REV. 1, 22 (1981) (physicians have enormous autonomy in determining their own norms of practice).

36. Duncan Neuhauser, *Commentary: Medical Technology Assessment as Social Responsibility*, 36 CASE W. RES. L. REV. 878, 878-79 (1986).

37. See Leahy, *supra* note 4, at 1491.

38. 42 U.S.C. § 263a (1988).

39. HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3828, 3831.

40. Many state clinical laboratory statutes include these consequences within the statutory purpose of the statute. See, e.g., FLA. STAT. ANN. § 483.021 (West 1991); KY. REV. STAT. § 333.010 (Michie/Bobbs-Merrill 1990); TENN. CODE ANN. § 68-29-102 (1987). See also HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3828, 3831.

41. See Robert Crawley et al., *Regulation of Physicians' Office Laboratories: The Idaho Experience*, 255 JAMA 374, 381 (1986).

42. 42 U.S.C. § 263a (1988).

Amendments because laboratories failed to comply with CLIA's proficiency testing requirements.⁴³ One study showed that when a physician's office laboratory and a local hospital laboratory each tested the same specimens, the results from the physician's office laboratory varied significantly from the hospital laboratory's results.⁴⁴ In addition, the House Energy and Commerce Committee found that mobile laboratories in vans and in shopping malls provided unreliable test results.⁴⁵ Furthermore, cytologists were diagnosing slides at home.⁴⁶ Thus, serious questions were raised concerning the accuracy of laboratory tests performed in unregulated laboratories.

Prior to the enactment of the Amendments, CLIA regulated only those physicians' office laboratories performing interstate testing.⁴⁷ These regulations excluded laboratories "whose operations [were] so small or infrequent as not to constitute a significant threat to the public health"⁴⁸ and any physician's laboratory operated "solely as an adjunct to the treatment of his . . . own patients."⁴⁹ Furthermore, few states enacted clinical laboratory statutes that included physicians' office laboratories.⁵⁰

The Amendments require certification for all office laboratories except those performing only simple procedures.⁵¹ Simple procedures are defined as procedures with "an insignificant risk of an erroneous re-

43. HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3828, 3833. See also Charles W. Griffin, III, et al., *Relationship Between Performance in Three of the Centers for Disease Control Microbiology Proficiency Testing Programs and the Number of Actual Patient Specimens Tested by Participating Laboratories*, 23 J. CLINICAL MICROBIOLOGY 246 (1986).

44. This study examined results of hemoglobin, hematocrit, glucose, urea nitrogen, creatinine, uric acid, cholesterol, and total protein testing. Crawley, *supra* note 41, at 374.

45. HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 15 (1988), reprinted in 1988 U.S.C.C.A.N. 3828, 3836.

46. *Id.* at 17, reprinted in 1988 U.S.C.C.A.N. 3828, 3838.

47. Clinical Laboratories Improvement Act, Pub. L. No. 90-174, § 353(b)(1), 81 Stat. 536 (1967); Marsha A. Goldsmith, *Federal Proficiency Testing Requirements Set to Start for POLs*, 262 JAMA 2355, 2355 (1989).

48. Clinical Laboratories Improvement Act, Pub. L. No. 90-174, § 353(b)(2), 81 Stat. 536 (1967).

49. *Id.* § 353(i), 81 Stat. at 538.

50. These states included California, Florida, Idaho, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oregon, Pennsylvania, West Virginia, Wisconsin, and Wyoming. Carol Gorove et al., *State Regulation of Physician Office Laboratories*, 17 LABORATORY MED. 44, 45 (1986).

51. 42 U.S.C. § 263a(d)(2)(A) (1988); Paul M. Fischer & Darroll Loschen, *Federally Regulated Office Laboratories*, AM. FAM. PHYSICIAN, Nov. 1989, at 95, 95. See generally HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 22 (1988), reprinted in 1988 U.S.C.C.A.N. 3828, 3843.

sult."⁵² These procedures include tests approved by the Food and Drug Administration (FDA) for home use, tests that are "so simple and accurate as to render the likelihood of erroneous results negligible," and tests that "pose no reasonable risk of harm to the patient if performed incorrectly."⁵³

Under the Amendments, proficiency testing is used to determine whether a laboratory meets certification standards.⁵⁴ A laboratory is not required to meet the Amendments' proficiency testing requirements if it meets the standards of an approved accrediting body.⁵⁵ Accreditation is available from the Commission on Office Laboratory Assessment (COLA), the College of American Pathologists, the American Association of Bioanalysts, and state agencies.⁵⁶

The Amendments also require laboratory inspections.⁵⁷ Unannounced inspections are permissible if they are conducted during business hours.⁵⁸ In addition, the Amendments allow the states to enact clinical laboratory statutes and regulations.⁵⁹ Yet, as Part III of this Note demonstrates, state legislatures have not enacted statutes beyond laboratory regulations to ensure quality in physicians' office procedures.

III. THE REGULATION OF PHYSICIAN BEHAVIOR

A. Current State Legislation

Through their general police power, state legislatures have the authority to regulate health care and consequently, physician behavior.⁶⁰

52. 42 U.S.C. § 263a(d)(3) (1988). The Illinois clinical laboratory statute contains a more comprehensive definition of a simple procedure:

"Simple test" means a test . . . which generally [has] the following characteristics:

(a) interpretation of a visual signal by pattern recognition, color definition or numeric information using an established control example;
 (b) the use of simple addition, subtraction, multiplication, or division; or
 (c) the use of manufacturer-prepared reagents or solutions which are combined without requiring numerous specific calibrated volume measurements or sequential application.

ILL. ANN. STAT. ch. 111 1/2, para. 622-118 (Smith-Hurd 1988).

53. 42 U.S.C. § 263a(d)(3) (1988).

54. *Id.* § 263a(f)(3). See also Fischer, *supra* note 51, at 95.

55. 42 U.S.C. § 263a(e)(1)(A) (1988).

56. HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 15 (1988), reprinted in 1988 U.S.C.C.A.N. 3828, 3836. See also Fischer, *supra* note 51, at 95; K. Michael Peddecord & Ronald L. Cada, *Clinical Laboratory Proficiency Test Performance: Its Relationship to Structural, Process and Environmental Variables*, 73 AM. J. CLINICAL PATHOLOGY 380 (1980).

57. 42 U.S.C. § 263a(g) (1988).

58. *Id.*; HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 34 (1988), reprinted in 1988 U.S.C.C.A.N. 3828, 3855.

59. 42 U.S.C. § 263a(p) (1988).

60. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

Without federal regulation of physicians' office procedures, the states may implement their own policies. Yet, regulation of physicians' office procedures may not be appropriate for all states. For example, a state with substantial physician activity may decide to implement strict regulations for physicians' office procedures. A state with a low physician population may fear that regulation will decrease physicians' desire to practice in that state and worsen its shortage of medical practitioners. Therefore, state legislatures concerned about their physician population may reject the implementation of physician regulation. For these states, risks in physician office practice may be a necessary cost of providing health care in rural areas. Because state regulation can be tailored to meet the needs of a particular consumer population, state regulation is preferable to federal control of physicians' office procedures.

B. The States' Role in Regulating Physician Behavior

With the exception of laboratory performance, state legislatures have not extended governmental regulation into the physician's office. An examination of state health facility statutes reveals that private physicians are not included in the statutes or are specifically excluded. Ten states specifically exclude physicians' offices from their statutes authorizing the regulation of hospitals.⁶¹ In addition, fifteen states specifically exclude physicians' offices from health facility regulations.⁶² Of these fifteen states, six exclude physicians from their certificate of need statutes,⁶³ and four do not have a certificate of need statute.⁶⁴ Therefore, in ten states, physicians can purchase medical equipment without review and

61. ALA. CODE § 22-21-20(1) (1990); ILL. ANN. STAT. ch. 111 1/2, para. 1153 (Smith-Hurd 1988 & Supp. 1991); IND. CODE § 16-10-1-6 (1988); LA. REV. STAT. ANN. § 40:2102(A)(1) (West 1977); MINN. STAT. ANN. § 144.50(2) (West 1989); MISS. CODE ANN. § 41-9-3(a) (1981 & Supp. 1991); NEB. REV. STAT. § 71-2017.01(2) (1981); N.H. REV. STAT. ANN. § 151:2 (1990); R.I. GEN. LAWS § 23-17-2(1) (1989 & Supp. 1990); W. VA. CODE § 16-5B-1 (1991).

62. ALA. CODE § 22-21-20(1) (1990); CAL. HEALTH & SAFETY CODE §§ 1206(a), 1206.1 (West 1990); GA. CODE ANN. § 31-7-1 (Michie 1990); ILL. ANN. STAT. ch. 111 1/2, para. 1153 (Smith-Hurd 1988 & Supp. 1991); IND. CODE § 16-10-4-2(b)(9) (1988); MD. HEALTH-GEN. CODE ANN. § 19-101(c)(2)(5) (1990 & Supp. 1991); MINN. STAT. ANN. § 144.50(2) (West 1989); MONT. CODE ANN. § 50-5-101(19) (1991); NEB. REV. STAT. § 71-2017.01(4) (1981); N.H. REV. STAT. ANN. § 151:2 (1990); 35 PA. CONS. STAT. ANN. § 448.802a (Supp. 1991); R.I. GEN. LAWS § 23-17-2(1) (1989 & Supp. 1990); UTAH CODE ANN. § 26-21-2(10) (1989 & Supp. 1991); WASH. REV. CODE ANN. § 70.37.020(3) (West 1975 & Supp. 1991); W. VA. CODE § 16-5B-1 (1991).

63. ALA. CODE § 22-21-20(1) (1990); ILL. ANN. STAT. ch. 111 1/2, para. 1153 (Smith-Hurd 1988 & Supp. 1991); MONT. CODE ANN. § 50-5-101(19) (1991); NEB. REV. STAT. § 71-5810 (1986 & Supp. 1990); 35 PA. CONS. STAT. ANN. § 448.103 (Supp. 1991); W. VA. CODE § 16-2D-2 (1991). *See generally supra* text accompanying notes 22-28.

64. These states are: California, Indiana, Utah, and Washington.

can operate that equipment in their offices without meeting the requirements of state health facility statutes.

Similarly, twenty-seven states specifically include outpatient surgical clinics in their health facility statutes,⁶⁵ yet eighteen of these states exclude physicians' offices from these same statutes.⁶⁶ In addition, twenty-four states regulate laboratories outside of the inpatient setting,⁶⁷ but despite

65. ALA. CODE § 22-21-20(1) (1990); ARIZ. REV. STAT. ANN. § 36-401(29) (Supp. 1990); ARK. CODE ANN. § 20-8-101(C) (Michie 1990); CAL. HEALTH & SAFETY CODE § 1204(b)(1) (West 1990) (surgical clinics); FLA. STAT. ANN. § 395.002(2) (West 1986 & Supp. 1991); HAW. REV. STAT. § 321-11 (1988 & Supp. 1989); ILL. ANN. STAT. ch. 111 1/2, para. 1153 (Smith-Hurd 1988 & Supp. 1991); IND. CODE § 16-10-1-6(b) (1988); KAN. STAT. ANN. § 65-425(f) (1985); KY. REV. STAT. ANN. § 216B.015(11) (Michie/Bobbs-Merrill 1989); LA. REV. STAT. ANN. §§ 40:2131 - 40:2141 (West 1977 & Supp. 1991); ME. REV. STAT. ANN. tit. 22, § 1812-E (West Supp. 1990); MD. HEALTH-GEN. CODE ANN. § 19-101(e)(1)(iii) (1990 & Supp. 1991); MICH. COMP. LAWS ANN. § 333.20104(b)(5) (West 1989); MINN. STAT. ANN. § 144.50(2) (West 1989); MISS. CODE ANN. §§ 41-75-1 to -29 (Supp. 1991); MONT. CODE ANN. § 505-5-101(4) (1991); NEV. REV. STAT. ANN. § 449.019 (Michie 1989); N.C. GEN. STAT. §§ 131E-145 to -152 (1988); 35 PA. CONS. STAT. ANN. § 448.802a (Supp. 1991); R.I. GEN. LAWS § 23-17-2(1) (1989 & Supp. 1990); S.D. CODIFIED LAWS ANN. § 34-12-1.1(1) (1986 & Supp. 1991); TENN. CODE ANN. § 68-11-201(1) (1987 & Supp. 1991); TEX. HEALTH & SAFETY CODE ANN. §§ 243.001 to -.014 (West Supp. 1991); UTAH CODE ANN. § 26-21-2(2) (1989 & Supp. 1991); W. VA. CODE § 16-5B-1 (1991); WYO. STAT. § 35-2-901(a)(ii) (Supp. 1991).

66. ALA. CODE § 22-21-20(1) (1990); CAL. HEALTH & SAFETY CODE §§ 1206(a), (i), 1206.1 (West 1990); FLA. STAT. ANN. § 395.002(2) (West 1986 & Supp. 1991); ILL. ANN. STAT. ch. 111 1/2, para. 1153 (Smith-Hurd 1988 & Supp. 1991); ME. REV. STAT. ANN. tit. 22, § 1812-E (West Supp. 1990); MD. HEALTH-GEN. CODE ANN. § 19-101(e)(2)(v) (1990 & Supp. 1991); MICH. COMP. LAWS ANN. § 333.20104(b)(5) (West 1989); MINN. STAT. ANN. § 144.50(2) (West 1989); MISS. CODE ANN. § 41-75-1(a) (Supp. 1991); MONT. CODE ANN. § 505-5-101 (1991); NEV. REV. STAT. ANN. § 449.019 (Michie 1989); N.C. GEN. STAT. § 131E-146(1) (1988) (physicians acting within their offices are excluded if they perform "incidental, limited ambulatory surgical procedures"); 25 PA. CONS. STAT. ANN. § 448.802a (Supp. 1991); R.I. GEN. LAWS 23-17-2(1) (1989 & Supp. 1990); S.D. CODIFIED LAWS ANN. § 34-12-1.1(1) (1986 & Supp. 1991); TENN. CODE ANN. § 68-11-201(1) (1987 & Supp. 1991); W. VA. CODE § 16-5B-1 (1991); WYO. STAT. § 35-2-901(a)(ii) (Supp. 1991).

67. ALA. CODE § 22-21-20(1) (1990); CAL. BUS. & PROF. CODE §§ 1200-13 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. § 19a-30 (West 1986); FLA. STAT. ANN. §§ 483.011 to -.151 (West 1989); GA. CODE ANN. §§ 31-22-1 to -13 (Michie 1991); ILL. ANN. STAT. ch. 111 1/2, para. 621-101 to -123 (Smith-Hurd 1988 & Supp. 1991); IND. CODE ANN. § 16-9-7-1 (West Supp. 1991); KY. REV. STAT. ANN. §§ 333.010 to -.990 (Michie/Bobbs-Merrill 1990); ME. REV. STAT. ANN. tit. 22, §§ 2011 - 2039 (West 1980 & Supp. 1990); MD. HEALTH-GEN. CODE ANN. §§ 17-201 to -212 (1984 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 111D, §§ 1-8 (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 333.20501 to -.20554 (West 1980 & Supp. 1991); MONT. CODE ANN. § 50-5-191(12) (1991); 1990 Neb. Adv. Legis. Serv. 551; NEV. REV. STAT. ANN. §§ 652.070 to -.190 (Michie 1987); N.H. REV. STAT. ANN. § 151:2 (1990); N.J. STAT. ANN. §§ 45:9-42.1 to -.45 (West 1978 & Supp. 1991); N.Y. PUB. HEALTH LAW §§ 571 - 581 (Consol. 1990); OR. REV. CODE ANN. §§ 438.010 to -.990 (Baldwin 1989); 35 PA. CONS. STAT. ANN. §§

the Clinical Laboratory Improvement Amendments, eleven of these states continue to maintain statutes that exempt physicians' office laboratories from regulation.⁶⁸

State regulation of physician behavior outside of a hospital or health facility is limited. For example, New York and Pennsylvania regulate physician behavior in shared health facilities.⁶⁹ A shared health facility is an office used by three or more practitioners who provide care to Medicaid patients and who share common waiting areas, examining rooms, equipment, and support staff.⁷⁰ These statutes require physicians within shared health facilities to ensure follow-up care, adequate documentation, twenty-four hour availability, and patient privacy.⁷¹ The facility must also register and specify the services it provides.⁷² These statutes, however, do not ensure that procedures are performed in accordance with medical standards. In addition, because these statutes regulate only those offices where physicians share facilities and provide services to Medicaid patients, they reach only a small group of physicians' offices. Similarly, the Tennessee legislature proposed a bill that required a board to determine the qualifications for X-ray operators in physicians' offices.⁷³ The Tennessee bill, however, did not refer to physicians themselves.⁷⁴ Consequently, the board could have excluded physicians from these regulations.

Even when state legislatures attempt to include physicians' offices within health facility statutes, physicians can escape regulation when they practice in a setting that is not a hospital, a health facility, an outpatient surgical clinic, or a shared health facility. As a result, to ensure that only competent physicians will perform invasive procedures in their

2151-65 (1977 & Supp. 1991); R.I. GEN. LAWS §§ 23-16.2-2 to -10 (1988 & Supp. 1990); TENN. CODE ANN. §§ 68-29-102 to -135 (1987 & Supp. 1991); W. VA. CODE § 16-5J-1 to -10 (1991); WYO. STAT. §§ 33-34-101 to -109 (1987).

68. ALA. CODE § 22-21-20 (1990); CAL. BUS. & PROF. CODE § 1241(b) (West 1990); FLA. STAT. ANN. § 483.031 (West 1989); ILL. ANN. STAT. ch. 111 1/2, para. 621-103(c) (Smith-Hurd 1988 & Supp. 1991); KY. REV. STAT. ANN. § 333.040(2) (Michie/Bobbs-Merrill 1990); ME. REV. STAT. ANN. tit. 22, § 2013-A(1)(C)(1) (West Supp. 1990); MD. HEALTH-GEN. CODE ANN. § 17-201(b)(2) (1984 & Supp. 1990); MICH. COMP. LAWS ANN. § 333.20507 (West 1980); N.H. REV. STAT. ANN. § 151:2 (1990); R.I. GEN. LAWS § 23-16.2-3(a) (1988); TENN. CODE ANN. § 68-29-104(2) (1987 & Supp. 1991) (a physician is excluded only if the laboratory is for his own patients).

69. N.Y. PUB. HEALTH LAW §§ 4700 - 4714 (Consol. 1985 & Supp. 1991); 62 PA. CONS. STAT. ANN. § 1403 (Supp. 1991).

70. N.Y. PUB. HEALTH LAW § 4702(2); 62 PA. CONS. STAT. ANN. § 1401.

71. N.Y. PUB. HEALTH LAW § 4710; 62 PA. CONS. STAT. ANN. § 1403(c).

72. N.Y. PUB. HEALTH LAW § 4704(2); 62 PA. CONS. STAT. ANN. § 1403(a)(2).

73. S. Bill 2330, 1990 Tenn. Pub. Acts 726.

74. *Id.*

offices, state legislatures should enact statutes that regulate physicians' office procedures.

C. Other Means of Assuring Quality

Statutory regulation is appropriate because physicians' offices are not included in nonstatutory quality assurance standards. For example, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO)⁷⁵ is a voluntary accrediting body for hospitals, extended care facilities, psychiatric centers, alcohol and drug abuse centers, community mental health services, and ambulatory care services;⁷⁶ however, JCAHO accreditation is not available for physicians' offices.⁷⁷

JCAHO influenced the adoption of the outcome standards used by medical professionals to evaluate quality of care.⁷⁸ JCAHO evaluates documented health services data against predetermined standards.⁷⁹ In addition, although JCAHO is a consulting organization, not a regulatory body,⁸⁰ JCAHO accreditation may relieve a health facility from statutory regulation.⁸¹

Another quality assurance program that fails to reach physicians' offices are Professional Review Organizations (PROs). PROs are private contractors who work for the Medicare program.⁸² Hospitals and clinics reimbursed under Medicare's prospective payment system must enter into an agreement with a PRO.⁸³ PROs ensure that Medicare reimbursement is given to providers that render complete, accurate, and appropriate medical services.⁸⁴ In addition, state legislatures may require similar peer

75. Formerly the Joint Commission on Accreditation of Hospitals (JCAH).

76. Timothy S. Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 B.C. L. REV. 835, 841 (1983) [hereinafter Jost, *JCAH*]. See JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, ACCREDITATION MANUAL FOR HOSPITALS (1992) [hereinafter JCAHO].

77. JCAHO has, however, developed standards designed for ambulatory care clinics, ambulatory surgical centers, group practices, and primary care centers. JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, AMBULATORY HEALTH CARE STANDARDS MANUAL (1990).

78. Edwardson, *supra* note 10, at 25. See *supra* text accompanying notes 8-12.

79. See generally JCAHO, *supra* note 76.

80. Jost, *JCAH*, *supra* note 76, at 839.

81. See *id.* at 844.

82. 42 U.S.C. §§ 1320c - 1320c-12 (1988 & Supp. I 1989). See generally Alice G. Gosfield, *PROs: A Case Study in Utilization Management and Quality Assurance*, in HEALTH LAW HANDBOOK 361 (Alice G. Gosfield ed., 1989); Vance-Bryan, *supra* note 15, at 1425.

83. 42 U.S.C. § 1320c-2. See generally 3 Medicare & Medicaid Guide (CCH) ¶¶ 12,855, 12,860 (1987).

84. 42 U.S.C. § 1320c-3; 42 C.F.R. § 466.71 (1990). See also 3 Medicare & Medicaid Guide (CCH) ¶ 12,865 (1987).

review programs for hospitals and clinics.⁸⁵ Because nonstatutory quality assurance schemes such as JCAHO accreditation and peer review programs do not include physicians' offices, a state statute regulating physicians' office procedures will help to ensure that quality medical care is provided in this setting.

IV. PROPOSED CHANGES FOR ENSURING QUALITY IN PHYSICIANS' OFFICES

This Note recommends the implementation of a state statute to regulate physicians' office procedures. As discussed in previous sections, a statute regulating physicians' office procedures will help to identify physicians who deviate from accepted practices, to provide uniform application of outcome standards, and to decrease the incidence of unnecessary procedures and treatments. The proposed statute is designed to be practical and flexible without imposing an undue burden on private medical practice. To ensure quality, it also incorporates JCAHO standards that are applicable to the office setting.

The proposed statute defines the term "office" broadly to ensure public protection. In the proposed statute, an office includes any space shared by physicians⁸⁶ or operated by a health maintenance organization. Emergency medical centers and clinics not otherwise subject to state regulation will also be included in the statute's definition of office. A broad definition of the term office prohibits physicians from dodging regulation by renaming their office or changing its ownership or management form.

A. *Classifying Physicians' Office Procedures*

Physicians' office procedures vary in scope, nature, and sophistication. Because physicians perform numerous procedures within their offices, the proposed statute will implement a classification system for office procedures. Classification systems such as the Medical Device Classification Amendments, which regulate the safety of new medical devices, are frequently used in medical regulation.⁸⁷ Under the Medical Device Classification Amendments, each new medical device is placed into one of three classes.⁸⁸ These classes are defined broadly. Ultimately, a classification panel reviews each device and assigns it to a class.⁸⁹

85. See ARIZ. REV. STAT. ANN. § 36-445 (1990).

86. For a discussion of statutes regulating shared office space under the Medicaid program, see *supra* notes 70-72 and accompanying text.

87. See 21 U.S.C. §§ 360c-360k (1988 & Supp. I 1989).

88. *Id.* § 360c.

89. *Id.* § 360c(c).

Class I devices "[do] not present a potential unreasonable risk of illness or injury."⁹⁰ Class II devices require added assurance of their safety and effectiveness.⁹¹ Class III devices include devices for which "insufficient information exists for the establishment of a performance standard to provide reasonable assurance of [their] safety and effectiveness."⁹² Class III devices also include those devices that present a potential unreasonable risk of illness or injury.⁹³

The Pennsylvania Clinical Laboratory Act also uses a classification system.⁹⁴ Under the Pennsylvania Act, Level I laboratories must register and adhere to clinical laboratory regulations.⁹⁵ In contrast, Level II and Level III laboratories must register, follow clinical laboratory regulations, complete self-evaluation forms, and participate in a proficiency testing program.⁹⁶

The proposed statute will implement a classification system similar to these statutes. The proposed classification system for physicians' offices provides flexibility and avoids the necessity of providing separate regulations for every imaginable procedure. For example, the proposed statute divides physicians' office procedures into three classes. Class I procedures include noninvasive procedures that do not require a physician's skill. Class I procedures also include procedures typically performed by nursing or ancillary staff. These procedures include electrocardiograms, vital signs measurements, ear cleaning and irrigation, throat swabs, urinary catheter placement, intravenous catheter placement, and glaucoma screening. Class I procedures are excluded from the pro-

90. *Id.* § 360c(a)(1)(A). See also 21 C.F.R. § 860.3(c)(1) (1991).

91. 21 U.S.C. § 360c(a)(1)(B); 21 C.F.R. § 860.3(c)(2). The FDA will consider the following factors in establishing performance standards for Class II devices and premarket approval of Class III devices: (1) the persons for whose use the device is represented or intended; (2) the conditions of use; (3) the probable health benefit weighed against any probable injury; and (4) the reliability of the device. 21 C.F.R. § 860.7(b) (1991).

92. 21 U.S.C. § 360c(a)(1)(C)(ii) (1988); 21 C.F.R. § 860.3(c)(3) (1991).

93. *Id.* § 360c(a)(1)(C)(ii)(II).

94. 35 PA. CONS. STAT. §§ 2151-2165 (1977 & Supp. 1991).

95. Level I laboratories may perform urinalysis, glucose, pregnancy, white blood cell, hemoglobin, hematocrit, sedimentation rate, primary culture, occult blood, pinworm, *Trichomonas vaginalis*, and sickle cell testing. 28 PA. CODE § 5.1(ii) (1989). Cf. ILL. ANN. STAT. ch. 111 1/2, para. 622-108 to -111 (Smith-Hurd 1988). See also Josephine Bartola, *Painless Office Laboratory Regulation*, 13 PRIMARY CARE 605, 609 (1986); Miriam M. Bloch et al., *Longitudinal Study of Error Prevalence in Pennsylvania Physicians' Office Laboratories*, 260 JAMA 230, 230 (1988).

96. Level II laboratories may perform differential cell counts, prothrombin times, mononucleosis testing, B-streptococcus throat cultures, urinary tract infection testing and cell counts, and Gram's stains. Level III laboratories are those laboratories performing Level II testing and any other laboratory testing not included in Level I or Level II. Bloch, *supra* note 95, at 230-31. See *supra* note 95.

posed statute because they include noninvasive procedures that require only general skill.

Class II procedures require a higher degree of physician skill. This class includes procedures routinely performed by physicians such as X-rays, Pap smears, nuclear medicine services, and ultrasounds.⁹⁷ Although the Clinical Laboratory Improvement Amendments are designed to ensure proficient Pap smear readings, laboratory personnel may misread Pap smear specimens because the clinician failed to properly prepare the slide.⁹⁸ For this reason, Pap smears are regulated as Class II procedures, rather than Class I procedures which are excepted from the statute.

Class III procedures include invasive procedures that require an even higher level of physician skill and training. Shunt and catheter placement are examples of Class III procedures. Peripheral intravenous catheter placement is excluded because it is performed by nurses. Other Class III procedures include pacemaker placement, cardiac catheterization, biopsies, thoracentesis,⁹⁹ paracentesis,¹⁰⁰ and bronchoscopic,¹⁰¹ endoscopic,¹⁰² cystoscopic,¹⁰³ and fluoroscopic procedures.¹⁰⁴ Class III procedures also include hemodialysis¹⁰⁵ and radiation therapy.¹⁰⁶

97. For descriptions of the diagnostic imaging procedures mentioned and others, see MARTIN P. SANDLER ET AL., CORRELATIVE IMAGING (1989); TECHNIQUES IN DIAGNOSTIC IMAGING (Graham H. Whitehouse & Brian Worthington eds., 2d ed. 1990).

98. See HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 16-17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3828, 3837.

99. Thoracentesis is a procedure in which the physician removes fluid from the pleural (lung) cavity using a needle or other hollow instrument. See STEDMAN'S MEDICAL DICTIONARY 1446 (24th ed. 1982).

100. Paracentesis is a procedure in which the physician removes fluid from a body cavity using a needle or other hollow instrument. See *id.* at 1024.

101. Bronchoscopic procedures are procedures in which the physician examines the interior of the tracheobronchial tree using an endoscope to diagnose, to obtain biopsy samples, or to remove foreign bodies. See *id.* at 195.

102. Endoscopic procedures include any procedure in which the physician uses a lighted tubular scope to examine a canal or hollow organ of the digestive, respiratory, urogenital, or endocrine system. See *id.* at 465, 1566.

103. Cystoscopic procedures are procedures in which the physician uses a lighted tubular scope to examine the bladder's interior. See *id.* at 357.

104. Fluoroscopic procedures are procedures in which tissues and deep structures of the body are examined by X-rays that are projected onto a screen. See *id.* at 543.

105. Hemodialysis is a procedure by which toxic agents and electrolytes are removed from and necessary solutes are added to the patient's blood as it flows through a membrane or "artificial kidney." See LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 44.26 (Charles J. Frankel ed., 1977). See generally ALLEN R. NISSEN ET AL., CLINICAL DIALYSIS (1990).

106. For a discussion of other procedures that may be classified as Class III procedures, see ARTHUR B. DUBLIN, OUTPATIENT INVASIVE RADIOLOGIC PROCEDURES: DIAGNOSTIC AND THERAPEUTIC (1989).

In addition, Class III procedures may be performed in settings that are subject to state health facility statutes. For example, twelve states specifically include independent dialysis centers within their health facility statutes.¹⁰⁷ Under the proposed statute, dialysis is a Class III procedure; therefore, the proposed statute prohibits physicians from moving these procedures from a clinic to an office setting to avoid regulation. Once the office's managing physician determines what class of procedures are performed, the office must meet the registration requirements outlined in the next section.

B. Registration

Under the proposed statute, offices where Class II and Class III procedures are performed must be registered with the Physicians' Office Procedure Committee (the Committee); however, offices where only Class I procedures are performed are not included in the statute's mandates. Registration requires that the managing physician for any office where Class II and Class III procedures are performed submit an application that describes the procedures performed and the methodology used. The application will include a list of the qualifications of the personnel assisting with the procedures, the frequency or expected frequency of the performance of each procedure, and the physician's experience with the procedure. The managing physician must also agree to permit annual inspections by the Committee, provide records in accordance with the statute, and pay a registration fee. Registration and inspection will provide a means of identifying physicians who perform procedures or operate equipment in their offices without the additional skill required for their performance or operation.

C. Physician Responsibilities

The proposed statute is similar to health facility and hospital regulations and is consistent with physicians' tort liability because it requires

107. ALA. CODE § 22-4-2(7) (1990); CAL. HEALTH & SAFETY CODE §§ 417.1 to -.8 (West 1990); CONN. GEN. STAT. § 19a-269 (West 1986); IND. CODE § 16-1-3.4-1(3) (1988); KAN. STAT. ANN. § 65-4801(b) (1985); KY. REV. STAT. ANN. § 216B.015(12) (Michie/Bobbs-Merrill 1991); MD. HEALTH-GEN. CODE ANN. § 13-307 (1982 & Supp. 1990); MONT. CODE ANN. § 50-5-101(26) (1989); 35 PA. CONS. STAT. ANN. § 448.103 (Supp. 1991); R.I. GEN. LAWS § 23-17-2(1) (Supp. 1991); UTAH CODE ANN. § 26-21-2(5) (Supp. 1991); WYO. STAT. § 35-2-901(a)(x) (Supp. 1991). Cf. MD. HEALTH-GEN. CODE ANN. § 19-101(e)(2)(iii), (iv) (Supp. 1991) (excluding kidney disease treatment facilities).

that offices where Class II and Class III procedures are performed must be maintained in a safe and hygienic condition. Physicians must provide adequate personnel, equipment, and space for the number of procedures performed.¹⁰⁸ In addition, to ensure safety in the performance of these procedures, equipment must be maintained in safe condition through inspection, calibration, and maintenance in accordance with the manufacturer's recommendations.

Furthermore, Class II and Class III procedures tend to require blood or tissue contact; therefore, physicians who perform these procedures may generate infectious waste and linen. For this reason, infection control guidelines must be imposed. For example, physicians' office personnel must dispose of needles in impervious containers, provide a work area for waste and dirty linen, and maintain records of sterilization test results.¹⁰⁹

Another essential requirement for Class II and Class III procedures is the availability of emergency services. Emergency equipment and physician training in cardiac life support are necessary to ensure that the physician can safely transport patients to a hospital emergency department if necessary. Physicians performing Class II procedures must be certified in Basic Cardiac Life Support, but physicians performing Class III procedures must be certified in Advanced Cardiac Life Support.¹¹⁰ The distinction is made because Class III procedures are more likely to result in the need for emergency services. Each office in which Class III procedures are performed must also maintain an emergency cardiopulmonary equipment cart to be used if a patient's respirations or heart beat stops.¹¹¹

Under the proposed statute, physicians must also maintain medical records that include the patient's relevant history, chief complaint, procedures performed, and any follow-up care provided.¹¹² These records ensure comprehensive patient care and provide the Committee with documentation. The Committee can also use these records to determine whether the physician chose procedures appropriate to the patient's symptoms, whether the patient experienced adverse effects with similar procedures, and whether the physician provided appropriate follow-up care.

108. Cf. 42 U.S.C. § 263a(d) (1988); JCAHO, *supra* note 76, at PA.2.

109. Cf. IND. ADMIN. CODE tit. 410, r. 15-2-14(2), (3) (1988); MINN. R. 4675.2400(1) (1990).

110. See generally AMERICAN HEART ASSOCIATION, TEXTBOOK OF ADVANCED CARDIAC LIFE SUPPORT (1989).

111. Cf. JCAHO, *supra* note 76, at ER.6.8.2.

112. Cf. IND. ADMIN. CODE tit. 410, r. 15-2-8(1) (1988); JCAHO, *supra* note 76, at HO.5.2.

Finally, physicians and their office personnel are required to maintain continuing education related to the office procedures performed. The Physicians' Office Procedure Committee is responsible for determining these educational requirements.

D. The Physicians' Office Procedure Committee

The proposed statute will implement a Physicians' Office Procedure Committee that is designed to meet the characteristics of effective peer review. These characteristics include: (1) practitioners knowledgeable in the practice reviewed; (2) objective analysis; (3) a focus on the evaluation of quality; (4) protection from legal intrusion; and (5) removal from corrective action decisions.¹¹³

The Committee will be the regulatory body that will enact the rules and regulations necessary to implement the statute. These rules and regulations may describe Class II or Class III procedures. They may relate to physician or staff qualifications. They may also include regulations designed to maintain sanitary conditions and safe equipment.¹¹⁴ The Committee will also ensure that Class II and Class III offices are inspected annually and will maintain a list of registered offices that will be available to the public.¹¹⁵ The list will serve to: (1) assist physician referral; (2) deter behavior that violates the statute; and (3) allow consumers to assess physician performance.¹¹⁶

A clinical engineer, a nurse or ancillary medical professional, physicians, and health care consumers will participate in the proposed Physicians' Office Procedure Committee. To maintain an unbiased Committee, the appointing body will be separate from any organization that only represents the medical profession. The appointing body may be the legislature or an appropriate administrative agency.

The Committee may select its own officers.¹¹⁷ The Director is responsible for office registrations and for employing any staff necessary to assist the Committee. The Secretary will publish the rules and regulations enacted by the Committee. The Treasurer will maintain the

113. Roberts, *supra* note 13, at 73.

114. Cf. NEV. REV. STAT. ANN. § 652.130 (Michie 1987) (under the Nevada Medical Laboratory Certification and Improvement Act, the state board of health is required to publish regulations concerning sanitary conditions in the lab).

115. Cf. 42 U.S.C. § 263a(n) (1988); ARIZ. REV. STAT. ANN. § 36-463.01 (Supp. 1990).

116. Cf. HOUSE ENERGY AND COMMERCE COMMITTEE, H. REP. NO. 899, 100th Cong., 2d Sess. 38 (1988), reprinted in 1988 U.S.C.C.A.N. 3828, 3859.

117. See *id.*

Physicians' Office Procedure Revolving Fund.¹¹⁸ This fund includes gifts, grants, donations, workshop fees, and fines levied under the Act.¹¹⁹ The Treasurer will also collect fines and fees, pay bills, and prepare an annual budget.¹²⁰

E. The Physicians' Office Disciplinary Panel

The Physicians' Office Disciplinary Panel (the Panel) is the disciplinary body under the proposed statute. As with the Committee, the appointing body may be the legislature or an administrative agency. Committee members may not serve on the Panel, and Panel members may not serve on the Committee. A Panel separate from the Committee is created to avoid collusion within a single administrative body. A physician is more likely to receive fair notice and hearing if the inspection and disciplinary bodies are separate. Thus, physicians' actions will be reviewed twice before any disciplinary action is taken.

The Panel will examine requests for hearings generated from Committee inspections and consumer complaints. The Panel will also ensure that physicians who receive unfavorable inspection results or complaints are given an opportunity for a hearing.¹²¹ If the public safety is threatened, however, the Panel may suspend the office's registration and petition to enjoin the performance of procedures.¹²² The physician, however, is entitled to an appeal.

After a hearing is held, the Panel may revoke, limit, or suspend an office's registration. Office registration revocation, limitation, or suspension is appropriate when a physician provides misleading infor-

118. Cf. ARIZ. REV. STAT. ANN. § 36-468 (Supp. 1990).

119. Cf. *id.*

120. Cf. *id.*

121. Cf. N.Y. PUB. HEALTH LAW § 577(3) (Consol. 1990) (concerning laboratory services) which provides:

No permit or certificate shall be revoked, suspended, limited or annulled without a hearing. However, a permit or certificate may be temporarily suspended without a hearing for a period not in excess of thirty days upon notice to the permit or certificate holder following a finding by the department that the public health, safety or welfare is in imminent danger.

122. Cf. GA. CODE ANN. § 31-22-12 (Michie 1991) which provides:

The operation or maintenance of an unlicensed clinical laboratory in violation of this chapter is declared a nuisance, inimical to the public health, welfare, and safety. The commissioner in the name of the people of the state through the Attorney General may, in addition to other remedies provided in this chapter, bring an action for an injunction to restrain such violation or to enjoin the future operation or maintenance of any such clinical laboratory until compliance with this chapter or the rules or regulations promulgated under this chapter has been demonstrated to the satisfaction of the department.

mation to the Committee or Panel.¹²³ The Panel may also apply these remedies when the physician performs procedures without registering his office,¹²⁴ when a physician refuses a reasonable request for information by the Committee or the Panel, or when a physician helps another physician to violate the Act or refers patients to an office that performs Class II and Class III procedures without a registration.¹²⁵ In the alternative, the Panel may also recommend to the Attorney General that a physician who performs procedures in an unregistered office or who knowingly violates the Act be charged with a misdemeanor. The Panel is also required to generate a report to the state licensure board that identifies physicians who have violated the Act. The Panel may also impose a supervised correction plan or a monetary penalty before revoking, suspending, or limiting office registration.¹²⁶

In summary, the proposed statute divides physicians' office procedures into three classes. The statute imposes personnel, office conditions, and equipment requirements for the two classes of procedures that are likely to result in harm to patients. In addition, the statute creates a Committee to register offices subject to the statute and to conduct inspections. Finally, the proposed statute creates a disciplinary Panel to hold hearings, sanction physicians performing procedures in unregistered offices, and address consumer complaints.

V. CONCLUSION

Under current state laws, physicians are free from quality assurance review when they practice medicine within their offices. Yet, with the increase in outpatient services, physicians are providing a wide variety of services within their offices. Like Dr. Jones, physicians can now purchase diagnostic equipment and perform procedures without referring patients to a hospital or clinic. State legislatures must ensure that patients are protected not only in hospitals, nursing homes, and clinics, but also within physicians' offices; thus, a compelling need exists for state statutes requiring office registration, routine inspections, and consumer complaint investigation to ensure patient safety. The proposed statute will help to ensure that patients receive quality medical care when they are treated in a physician's office.

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123. Cf. 42 U.S.C. § 263a(i)(1)(A) (1988); GA. CODE ANN. § 31-22-2(d)(1) (Michie 1989); N.Y. PUB. HEALTH LAW § 577(1)(a) (Consol. 1990).

124. Cf. 42 U.S.C. § 263a(i)(1)(B).

125. Cf. 42 U.S.C. § 263a(i)(1)(C)-(F) (1988); GA. CODE ANN. § 31-22-2(d)(5) (Michie 1991); N.Y. PUB. HEALTH LAW § 577(1)(g) (Consol. 1990).

126. Cf. 42 U.S.C. § 236a(h)(2) (1988).

Appendix

A Bill for an Act to Ensure Quality in Medical Services Delivery Within Physicians' Offices

Effective: Upon passage.

Be it enacted by the General Assembly:

Chapter 1. *Purpose.*

The Legislature finds that the treatment of illness is frequently provided through diagnostic and therapeutic procedures and that inaccurately performed medical procedures endanger the health and lives of this State's citizens. Diagnostic procedures provide essential services to patients by furnishing practitioners with information that is essential in identifying or treating a medical condition. Physicians' office procedures should be performed by physicians having sufficient expertise and experience to assure quality and accuracy. The Legislature therefore declares it to be a public policy of this State to register physicians' offices where diagnostic and therapeutic procedures are performed and to set necessary standards for the care rendered within those offices.¹²⁷

Chapter 2. *Definitions.*

These definitions apply throughout this Act:

- (1) "Applicant" or "registrant" means anyone registering or in the process of registering an office in compliance with Chapter 4 of this Act.
- (2) "Direct supervision" means that a physician supervises the procedure and determines which drugs or devices will be used.
- (3) "Infectious waste" means waste originating from the diagnosis, care, or treatment of a person that has been or may have been exposed to an infectious disease. Such waste includes but is not limited to:
 - (a) wastes originating from persons placed in isolation for the control and treatment of an infectious disease;
 - (b) bandages, dressings, casts, catheters, tubing, and the like used to treat infectious or potentially infectious wounds, burns, or surgical incisions;
 - (c) anatomical waste, human parts, or tissues;
 - (d) discarded hypodermic needles and syringes, scalpel blades, and similar materials; and

127. Cf. TENN. CODE ANN. § 68-29-102 (1989 & Supp. 1991); W. VA. CODE § 16-5J-1 (1991).

- (e) any waste that cannot be separated from infectious waste.¹²⁸
- (4) "Nuclear medicine" means the administration of a radioactive substance for diagnostic purposes or the act of performing associated imaging procedures or both.¹²⁹
- (5) "Office" includes:
 - (a) office or clinic space shared by a physician group, regardless of whether such physicians are a partnership, association, or corporation;
 - (b) offices or clinics maintained by medical practices such as health maintenance organizations or any other managed care provider;
 - (c) offices or clinics providing ambulatory surgery or health care services not otherwise subject to state regulation;
 - (d) emergency medical centers; and
 - (e) any other center, clinic, or office where physicians perform procedures.
- (6) "Physician" means a person licensed to practice medicine or osteopathy.
- (7) "Physicians' Office Disciplinary Panel" or the "Panel" means the panel defined by this Act under Chapter 8.
- (8) "Physicians' Office Procedure Committee" or the "Committee" means the committee defined by this Act under Chapter 6.

Chapter 3. *Classification of Procedures.*

Section 1. *Class I Procedures.*

- (1) Class I procedures are noninvasive procedures that do not require a physician's skill. Class I procedures include procedures typically performed by nursing or ancillary staff. These procedures include but are not limited to:
 - (a) electrocardiograms;
 - (b) vital signs measurement;
 - (c) ear cleaning and irrigation;
 - (d) throat swabs;
 - (e) urinary catheter placement;
 - (f) intravenous catheter placement;
 - (g) glaucoma screening; and
 - (h) other procedures as defined by the Committee.

128. Cf. MINN. R. 4675.2200 (1990).

129. Cf. VT. STAT. ANN. tit. 26, § 2801(4) (1989) ("Practice of nuclear medicine technology" means the act of giving a radioactive substance to a human being for diagnostic purposes, or the act of performing associated imaging procedures, or both.).

- (2) Offices in which only Class I procedures are performed are not subject to the requirements of this Act.

Section 2. *Class II Procedures.*

(1) Class II procedures require a higher degree of physician skill than Class I procedures. Class II procedures include noninvasive procedures routinely performed by physicians. These procedures include but are not limited to:

- (a) X-rays;
- (b) Pap smears;
- (c) nuclear medicine services;
- (d) ultrasound procedures; and
- (e) other procedures as defined by the Committee.

(2) Class II procedures may be performed by qualified persons as defined by the State's licensure requirements.

Section 3. *Class III Procedures.*

(1) Class III procedures are invasive procedures requiring physician skill and training. These procedures include but are not limited to:

- (a) shunt or catheter placement with the exception of peripheral intravenous access;
- (b) pacemaker placement;
- (c) cardiac catheterization;
- (d) biopsy sampling;
- (e) thoracentesis;
- (f) paracentesis;
- (g) bronchoscopic procedures;
- (h) endoscopic procedures;
- (i) cystoscopic procedures;
- (j) hemodialysis;
- (k) fluoroscopic procedures;
- (l) radiation oncology; and
- (m) other procedures as defined by the Committee.

(2) Class III procedures shall be performed only by a physician. Hemodialysis, however, may be performed by a qualified registered nurse under the direct supervision of a physician trained in hemodialysis.

Chapter 4. *Registration and Renewal.*

Section 1. *Registration.*

(1) Offices conducting only Class I procedures shall not be required to register under this Act. All offices conducting Class II and Class III procedures shall register in accordance with this Chapter.

(2) The Committee shall register a physician's office if the managing physician:

- (i) submits an application that describes:

- (A) the procedures performed in the office;
 - (B) the methodologies used for the procedures;
 - (C) the identity and qualifications of persons assisting with such procedures;
 - (D) the name of the office if different from the name of the physician or physicians practicing at such office;
 - (E) the office address and a brief physical description of the office;
 - (F) the name, residential address, and professional license number of every practitioner participating in the office;
 - (G) the name and residential address of the person designated to assume responsibility for the central coordination and management of the office's activities;
 - (H) the annual expected frequency of the performance of each procedure based on the frequency of performance in the past year of procedures for which registration is sought; and
 - (I) the length of time the physician has been performing such procedures.¹³⁰
- (ii) provides any other information required by the Committee to determine compliance with this Act;
 - (iii) agrees to provide the Committee with any change in the information submitted not later than three months after the change is put into effect;¹³¹
 - (iv) agrees to permit inspections by the Committee, its employees, or agents pursuant to Chapter 12 of this Act; and
 - (v) agrees to make records available and submit reports as required by the Committee or the Panel.¹³²
- (3) In addition, all applications for registration shall include any information requested by the Committee confirming the adherence to any applicable state statutes and regulations for the operation of the office including plumbing, heating, lighting, ventilation, electric services, water, sewage, specimen handling, and similar conditions to ensure the health and safety of office personnel and the public.¹³³

130. Cf. 42 U.S.C. § 263a(2)(A) (1988); N.Y. PUB. HEALTH LAW § 4704 (Consol. 1985) (registration of shared health facilities).

131. Cf. 42 U.S.C. § 263a(d)(1)(A)(iii) (1988).

132. Cf. *id.* § 263a(d)(1)(D).

133. Cf. ARIZ. REV. STAT. ANN. § 36-465(3) (Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 2023(2) (West 1980 & Supp. 1990).

- (4) Registration issued under this section shall be valid for two years or any shorter period established by the Committee.

Section 2. *Renewal.*

(1) When an office renews its registration the managing physician shall report:

- (a) the number and type of procedures performed;
- (b) the percentage of each registered procedure resulting in complications and a description of the type of complications involved;
- (c) the number of patients transferred to a hospital due to complications; and
- (d) the number of patients returning for follow-up.

Section 3. A registration fee shall be assessed for each office registered. The fee shall be determined by the Physicians' Office Procedure Committee.

Chapter 5. *Office Conditions Requirements.*

Section 1. *Physical Requirements.*

(1) Space, equipment, and supplies shall be adequate for the performance of procedures with optimal accuracy, precision, efficiency, timeliness, and safety.¹³⁴ Space and equipment needs shall be determined by the services contemplated and the estimated patient load. The office shall maintain space for administrative functions, public waiting, examination, and treatment rooms, and restrooms.¹³⁵

(2) A separate treatment room shall be maintained for Class III procedures.

(3) Sanitary toweling and soap, including holders, shall be provided at all handwashing areas.¹³⁶

(4) Examination tables shall lock and adjust to their required positions.¹³⁷

(5) Side rails and safety steps shall be available when needed.¹³⁸

134. See JCAHO, *supra* note 76, at PA.2.

135. See IND. ADMIN. CODE tit. 410, r. 15-1-12(4) (1988).

136. Cf. 15-1-22(5)(d).

137. See JCAHO, *supra* note 76, at ER.6.8.7.

138. See *id.* at ER.6.8.7.2.

Section 2. *Maintenance.*

- (1) Chemical substances used for maintenance, housekeeping, or control of insects or vermin shall be clearly labeled and stored separately from patient care supplies.¹³⁹
- (2) Each office shall routinely clean articles and surfaces with an appropriate cleanser.¹⁴⁰ Each office shall be kept free of dust, rubbish, dirt, and hazards. To ensure cleanliness, each office shall:
 - (a) maintain floors in a clean condition with a nonslip finish;
 - (b) clean toilets at least daily; and
 - (c) clean equipment at least monthly and between patient uses.¹⁴¹

Section 3. *Equipment.*

- (1) Only shockproof equipment shall be used.
- (2) All electrical equipment shall be grounded.
- (3) Temperatures shall be recorded daily for all temperature-controlled areas and instruments.¹⁴²
- (4) Each instrument or other device shall be calibrated, tested, or inspected according to the manufacturer's recommendations.
- (5) Records showing equipment calibration, testing, or inspection shall be maintained and be available to the Committee. These records shall include any significant actions taken in response to revealed deficiencies.¹⁴³
- (6) Equipment and supplies shall be suitable for the sizes of patients treated using the manufacturer's guidelines.¹⁴⁴
- (7) Equipment maintenance records shall be retained for the life of each instrument used.¹⁴⁵

Section 4. *Safety.*

- (1) *X-rays.*
 - (a) Protective gloves and aprons shall be available in the office.
 - (b) A physician who supervises or performs X-ray procedures must be a licensed doctor of medicine or licensed doctor of osteopathy who:
 - (i) is certified in radiology by the American Board of Radiology or by the American Osteopathic Board of Radiology; or

139. Cf. IND. ADMIN. CODE tit. 410, r. 15-1-22(9) (1988).

140. Cf. *id.* r. 16.2-2-6(g).

141. Cf. *id.* r. 16.2-2-6(g)(2).

142. See JCAHO, *supra* note 76, at PA.2.4.2.

143. See *id.* at PA.2.4.1.1.

144. See *id.* at HO.4.4.

145. See *id.* at PA.5.7.

- (ii) is certified or meets the requirements for certification in a medical specialty in which he has become qualified by experience and training in the use of X-rays for diagnostic purposes; or
- (iii) specializes in radiology and is a recognized specialist in radiology.¹⁴⁶

(2) *Infection Control.*

- (a) Infectious waste shall be collected in containers with moisture-proof, heavy-duty, or double plastic liners. These containers shall be kept closed or sealed at all times.¹⁴⁷
- (b) Disposal containers for needles shall provide safety from puncture wounds.¹⁴⁸
- (c) A workroom for soiled materials shall be present in all offices where Class III procedures are performed. This workroom shall contain a clinical sink or equivalent flushing rim fixture, a sink equipped for handwashing, a work counter, a waste receptacle, and a linen receptacle.¹⁴⁹
- (d) Monthly inspections of all sterilizing equipment shall be carried out by a qualified person.¹⁵⁰ Bacteriological cultures shall be used to check sterilization processes of all types at least monthly.¹⁵¹
- (e) Each office performing procedures requiring equipment sterilization shall maintain records of the results of bacteriological test of sterilizing equipment.¹⁵²

(3) *Oxygen.* Each office shall observe safety precautions when oxygen is stored or administered. Oxygen containers shall be suitably anchored to a floor, wall, or carrier to prevent tipping.¹⁵³

(4) *Other Safety & Hygiene Considerations.*

- (a) *Emergency Power.* In the event of power failure, the emergency power supply shall be sufficient to maintain emergency equipment. Battery power for emergency equipment is sufficient if available.¹⁵⁴
- (b) *Linen.*
 - (1) A clean linen storage area shall be provided in a clean closet or designated area within a clean workspace.¹⁵⁵

146. Cf. 42 C.F.R. § 405.1412 (1990).

147. See MINN. R. 4675.2400(1) (1990).

148. Cf. *id.* 4675.2400(2).

149. Cf. IND. ADMIN. CODE tit. 410, r. 15-1-10(6)(e)(2)(j) (1988).

150. Cf. *id.* r. 15-2-14(2).

151. Cf. *id.* r. 15-2-14(3).

152. Cf. *id.* r. 15-2-14(5)(b).

153. Cf. IND. ADMIN. CODE tit. 410, r. 16.2-2-6(n) (1988 & Supp. 1991).

154. Cf. JCAHO, *supra* note 76, at PA.2.3.3.

155. Cf. IND. ADMIN. CODE tit. 410, r. 15-1-10(6)(e)(2)(l) (1988).

(2) All linen shall be handled, processed, and transported in a way that guards against contamination of clean linen and transmission of infection.¹⁵⁶

(3) All soiled linens shall be placed in impervious bags or containers that are properly closed at the site of collection.¹⁵⁷

- (c) *Refuse.* Refuse and garbage shall be collected, transported, stored, and disposed of by methods which will decrease nuisances and hazards.¹⁵⁸ Insect- and rodent-proof refuse storage shall be provided.¹⁵⁹

Section 5. *Emergency Services.*

(1) A physician shall not perform Class III procedures within an office unless he or she is certified in Advanced Cardiac Life Support according to American Heart Association guidelines.¹⁶⁰

(2) All offices performing Class III procedures shall maintain a cart for the storage of emergency equipment to be used in the event of cardiopulmonary arrest. The cart's contents shall include but are not limited to:

- (a) appropriately sized airways;
 - (b) a bag-valve-mask resuscitator;
 - (c) appropriately sized laryngoscopes and endotracheal tubes;
 - (d) emergency resuscitation drugs recommended by the American Heart Association;¹⁶¹
 - (e) a portable monitor with a defibrillator having synchronous capabilities. The defibrillator may be a separate unit if it is kept with the emergency equipment cart;
 - (f) tracheobronchial and gastric suction source and equipment;
 - (g) oxygen source and administration equipment; and
 - (h) a vascular cut down set.¹⁶²
- (3) Emergency equipment, drugs, and supplies shall be checked daily and after each use to confirm that all items are immediately available and in usable condition.¹⁶³

156. *Cf. id.* r. 15-1-19(4).

157. *Cf. id.* r. 15-1-19(4)(c).

158. *Cf. id.* r. 15-1-20(6).

159. *Cf. id.* r. 15-1-22(5)(s).

160. See AMERICAN HEART ASSOCIATION, TEXTBOOK OF ADVANCED CARDIAC LIFE SUPPORT (1989).

161. *See id.*

162. *See* JCAHO, *supra* note 76, at ER.6.8.2.1.

163. *See id.* at HO.4.5.

Chapter 6. *Physicians' Office Procedure Committee.*

(1) *Committee members.* The Physicians' Office Procedure Committee shall be composed of nine members. One member shall be an engineer skilled in the proper use and maintenance of diagnostic and therapeutic medical equipment. One member shall be a nurse or ancillary medical professional. Four members shall represent consumers. Three members shall be practicing physicians. Committee members may be appointed by the Legislature or an administrative agency designated by the legislature.

(2) Each member of the Committee shall serve for three years except that:

(a) any member appointed to fill a vacancy occurring prior to the end of the term of which his or her predecessor was appointed shall be appointed for the remainder of such term;¹⁶⁴ and

(b) three members' terms shall expire each year so that three new members are appointed each year.

(3) The Committee shall select a director, assistant director, secretary, and treasurer from among its members.

(4) Six members shall constitute a quorum of the Committee.

(5) Committee members may receive compensation as determined by the Legislature.

(6) The Committee shall determine its own operating procedures for Committee business.

Chapter 7. *Duties and Responsibilities of the Physicians' Office Procedure Committee.*

Section 1. *Director.*

(1) The Director shall maintain a list of all offices meeting the requirements of this Act. The Director shall make this list available on request to the Panel, physicians, other health care providers, and the public.¹⁶⁵

(2) The Director shall supervise the employment of professional, clerical, technical, investigative, and administrative personnel to carry out the work of the Committee.

Section 2. *Secretary.*

(1) The Secretary shall:

(a) prepare any minutes, records, reports, registries, directories, books, and newsletters needed;

164. See 1990 Neb. Adv. Legis. Serv. 551.

165. Cf. 42 U.S.C. § 263a(n) (1988); ARIZ. REV. STAT. ANN. § 36-465 (Supp. 1990).

- (b) record all Committee transactions and orders; and
- (c) publish the rules and regulations enacted by the Committee.

Section 3. *Treasurer.*

- (1) The Treasurer shall:
 - (a) collect all monies due and payable for office registrations, office inspections, and fines imposed under Chapter 14, Section 1 of this Act;
 - (b) pay all bills for Committee expenditures; and
 - (c) prepare the annual budget.

Section 4. *General Duties.*

- (1) The Committee shall have the authority to enact rules and regulations relative to the quality of diagnostic and therapeutic procedures performed by physicians in their offices. The Committee shall use the current standards adopted by the Joint Commission on Accreditation of Healthcare Organizations and the American Osteopathic Association in prescribing rules and regulations. These rules and regulations may relate to:
 - (a) defining Class II and Class III procedures;
 - (b) equipment maintenance; and
 - (c) continuing education requirements for physicians and office personnel.¹⁶⁶
- (2) In carrying out its duties under this Chapter, the Committee may use the services of any state or local agency or nonprofit private organization and may pay for such services in advance.¹⁶⁷ The duties a state or local agency or nonprofit private agency or organization may perform include but are not limited to:
 - (a) conducting investigations;
 - (b) gathering information;
 - (c) monitoring continuing education compliance; and
 - (d) any other duties the Committee determines are necessary and appropriate for the enforcement of this Act.
- (3) The Committee shall ensure that all Class II and Class III offices are inspected annually.
- (4) In adopting or modifying regulations enacted pursuant to this Act, the Committee shall allow a reasonable time for compliance.

166. Cf. ARIZ. REV. STAT. ANN. § 36-465 (Supp. 1990); GA. CODE ANN. § 31-22-6 (Michie 1991); NEV. REV. STAT. ANN. § 652.130 (Michie 1987).

167. Cf. 42 U.S.C. § 263a(o) (1988).

- (5) Committee members shall be immune from civil liability for any action reasonably taken under this Act.

Section 5. *Prohibited Activities.*

- (1) The Committee shall not approve any office to perform an experimental procedure.
- (2) Committee members shall not be Panel members.
- (3) Committee members shall not have any financial or business arrangement with any Committee or Panel member which pertains to the business of physicians' office procedures.¹⁶⁸

Chapter 8. *The Physicians' Office Disciplinary Panel.*

- (1) *Panel members.* The Physicians' Office Disciplinary Panel shall consist of five members. One member shall be an engineer skilled in the proper use and maintenance of diagnostic and therapeutic medical equipment. Two members shall represent consumers. Two members shall be health care providers. Panel members may be appointed by the legislature or an administrative agency designated by the legislature.
- (2) Each member of the Panel shall serve for three years except that:
 - (a) any member appointed to fill a vacancy occurring before the end of the term of which his or her predecessor was appointed shall be appointed for the remainder of such term; and
 - (b) members' office terms shall expire:
 - (i) one at the end of the first year;
 - (ii) two at the end of the second year; and
 - (iii) two at the end of the third year.¹⁶⁹
- (3) Panel members shall not be Committee members.
- (4) Panel members shall not have any financial or business arrangement with any Committee or Panel member which pertains to the business of physicians' office procedures.¹⁷⁰

168. Cf. NEV. REV. STAT. ANN. § 652.170(5) (Michie 1987).

169. Cf. 1990 Neb. Adv. Legis. Serv. 551.

170. Cf. NEV. REV. STAT. ANN. § 652.170(5) (Michie 1987) ("No member of the advisory committee may have any financial or business arrangement with any other member which pertains to the business of laboratory analysis.").

Chapter 9. *Duties and Responsibilities of the Physicians' Office Disciplinary Panel.*

Section 1. *Panel Hearings.*

- (1) The Panel shall examine requests for hearings by the Committee.
- (2) The Panel shall not revoke, suspend, or limit any office registration without providing the physicians involved with an opportunity for a hearing. The Panel may, however, temporarily suspend or limit office registration for a period not in excess of sixty days upon written notice to the physicians' office following a Committee finding that the public health and safety is in imminent danger.¹⁷¹ The Panel may also, in the name of the people of the State through the Attorney General, bring an action for an injunction to restrain such violation or to enjoin present and/or future performance of Class II or Class III procedures.¹⁷²

Section 2. *Registration Revocation, Suspension, or Limitation by the Panel.*

- (1) A physicians' office registration may be revoked, suspended, limited, or denied if the Panel finds, after reasonable notice and opportunity for a hearing, that the office's physician(s) or employee(s):
 - (a) committed an act involving misrepresentation or fraud in providing information to the Committee or the Panel;¹⁷³
 - (b) engaged or attempted to engage in any Class II or Class III procedure without registering the office pursuant to this Act;¹⁷⁴
 - (c) engaged in any procedure resulting in an imminent threat to the public health;
 - (d) failed to comply with reasonable requests by the Committee or the Panel for information necessary to determine compliance with this Act or any rules or regulations enacted by the Committee thereunder;¹⁷⁵

171. Cf. N.Y. PUB. HEALTH LAW § 4712(b) (Consol. 1985) which provides: No registration shall be revoked, suspended, limited or annulled without a hearing. However, a registration may be temporarily suspended or limited without a hearing for a period not in excess of thirty days upon written notice to the shared health facility following a finding by the department that the public health or safety is in imminent danger.

172. Cf. 42 U.S.C. § 263a(j) (1988); 42 C.F.R. § 405.146 (1990); ARIZ. REV. STAT. ANN. § 36-478 (Supp. 1990); GA. CODE ANN. § 31-22-12 (Michie 1991).

173. Cf. 42 U.S.C. § 263a(i)(1)(A); GA. CODE ANN. § 31-22-2(d) (Michie 1991); N.Y. PUB. HEALTH LAW § 577(1)(a) (Consol. 1990).

174. See 42 U.S.C. § 263a(i)(1)(B); N.Y. PUB. HEALTH LAW § 577(1)(b).

175. Cf. 42 U.S.C. § 263a(1)(D)(ii).

- (e) refused a reasonable request of the Committee, the Panel, or any federal or state officer, employee, or agent duly designated by the Committee to inspect the office or pertinent records at any reasonable time;
- (f) violated or aided and abetted in the violation of any provisions of this Act or any rule or regulation enacted thereunder;¹⁷⁶
- (g) failed to comply with a sanction or corrective plan imposed under this Act;¹⁷⁷
- (h) consistently errs in the performance of a procedure for which the office is registered or in making reports based on a procedure;¹⁷⁸
- (i) referred patients for procedures to the office of a practitioner who is not registered to perform such procedures;¹⁷⁹
- (j) allowed an unregistered office to use his name, office name, or office address for the purpose of circumventing this Act or any rule or regulation enacted thereunder;¹⁸⁰ or
- (k) performed procedures within a Class for which the office is not registered.¹⁸¹

Section 3. In addition to or in lieu of revocation, suspension, limitation, or denial of the registration of an applicant or registrant, the Panel may impose any combination of the following intermediate sanctions:

- (1) a supervised correction plan;
- (2) civil money penalties in an amount of \$1,000 for each violation for each day of noncompliance with the requirements of this section;¹⁸² or
- (3) inspection costs.¹⁸³

Section 4. The Panel may also recommend to the Attorney General that a physician be charged with a misdemeanor if he or she:

176. Cf. 42 U.S.C. § 263a(i)(1)(F); N.Y. PUB. HEALTH LAW § 577(1)(g) (Consol. 1990).

177. Cf. 42 U.S.C. § 236a(i)(1)(G).

178. Cf. GA. CODE ANN. § 31-22-2(d)(3) (Michie 1991); N.Y. PUB. HEALTH LAW § 577(1)(c) (Consol. 1990).

179. Cf. 42 U.S.C. § 263a(i)(4) (1988).

180. Cf. GA. CODE ANN. § 31-22-2(d)(7) (Michie 1991).

181. Cf. FLA. STAT. § 483.201 (West 1991); GA. CODE ANN. § 31-22-2(d) (Michie 1991); MASS. GEN. LAWS ANN. ch. 111D § 11 (West 1983); N.Y. PUB. HEALTH LAW § 577 (Consol. 1990).

182. Cf. N.Y. PUB. HEALTH LAW § 4704(3) (Consol. 1985).

183. Cf. 42 U.S.C. § 263a(h)(2)(C) (1988).

- (1) operates, maintains, or directs the use of medical equipment or performs or supervises procedures in an office that is not registered or in a registered office in which the physician is not recorded as a practitioner;¹⁸⁴ or
- (2) knowingly violates any provision of this Act or any regulation promulgated by the Committee pursuant to this Act.¹⁸⁵

Section 5. Each day of a violation constitutes a separate violation.

Section 6. If a hearing is required or requested, the Panel shall notify the applicant or registrant of the date, time, and place of the hearing which shall be heard not more than ten days after notice is served or mailed. The notice shall fix the time and place for the hearing, which shall be no more than thirty days from the date of the mailing or delivery of the notice. The office shall file with the department within ten business days before the hearing, a written answer to the charges.¹⁸⁶

Section 7. Notice of hearing may be delivered by a Panel member or by registered mail to the office address specified on the registration application.

Section 8. If the physician does not attend a required hearing or does not respond within thirty days after notice of a complaint is served or mailed, any denial, refusal, or revocation of registration by the Panel shall become final.

Section 9. Any physician who has sanctions imposed under this Chapter or has had his registration revoked, suspended, limited, or denied may, at any time within sixty days after the Panel's sanctions or determinations become final, file a petition with the state court in the jurisdiction where the office is located. The clerk of the court shall send a copy of the petition to the Secretary. The Secretary shall file in the court within ten days of receipt of the petition, the record on which the action of the Panel is based.¹⁸⁷

Section 10. Upon a finding that office procedures were or are performed in violation of Section 2 of this Chapter, the Panel shall report to the

184. *Cf.* ARIZ. REV. STAT. ANN. § 36-479 (Supp. 1990).

185. *See id.*; N.Y. PUB. HEALTH LAW § 578(1) (Consol. 1990).

186. *Cf.* N.Y. PUB. HEALTH LAW § 577(4); 35 PA. CONS. STAT. § 2162 (1977 & Supp. 1991).

187. *Cf.* 42 U.S.C. § 263a(k)(1) (1988).

state body responsible for physician licensure the violation and any disciplinary action taken.

Section 11. Panel members shall be immune from civil liability for any action reasonably taken under this Act.

Chapter 10. *Personnel.*

Section 1. *Qualifications and Staffing.*

- (1) Nursing and ancillary staff for each office shall be commensurate with the patient care requirements, staff expertise, available support services, and procedures performed.¹⁸⁸
- (2) All personnel engaged in operating X-ray or nuclear medicine equipment shall be licensed or certified in accordance with all applicable state and local laws and regulations.¹⁸⁹
- (3) Any physician participating in radiation oncology services shall be certified by the American Board of Radiology or shall demonstrate comparable qualifications.¹⁹⁰

Section 2. *Orientation and Continued Education.*

- (1) *X-rays.* All personnel operating X-ray equipment shall receive annual instruction on:
 - (a) protection from unnecessary exposure to radiation;
 - (b) equipment maintenance and use;
 - (c) appropriate documentation;
 - (d) technical problems which may arise and their solutions;
 - (e) protection against electrical hazards; and
 - (f) the hazards of excessive exposure to radiation.¹⁹¹
- (2) *Cardiopulmonary Resuscitation.* For all offices in which Class III procedures are performed, the physician, nursing, and ancillary staff shall be certified annually in Basic Cardiac Life Support according to American Heart Association guidelines.¹⁹²

Chapter 11. *Medical Records.*

- (1) Medical records shall include:
 - (a) patient identification data;

188. See JCAHO, *supra* note 76, at NR.4.4.1.

189. See 42 C.F.R. § 405.1413 (1990); JCAHO, *supra* note 76, at NM.1.1.

190. See JCAHO, *supra* note 76, at RA.1.2.1.

191. Cf. 42 C.F.R. § 405.1413(b) (1990).

192. See JCAHO, *supra* note 76, at HO.2.1.2.

- (b) relevant patient history;
 - (c) the patient's chief complaint, physical findings, and disposition;
 - (d) a diagnosis, investigative diagnosis, or impression;
 - (e) a description of all diagnostic and therapeutic procedures performed at the office with results and observations related to such procedures including complications;
 - (f) the signature of the physician treating the patient;
 - (g) instructions given to the patient or his family and follow-up information;
 - (h) a copy of any information or reports that result from consultation with other practitioners; and
 - (i) patient allergies.¹⁹³
- (2) Each office shall store inactive medical records in a manner that provides protection from vermin and unauthorized use.¹⁹⁴
- (3) Each office shall maintain records for five years from the date of the patient's last visit.¹⁹⁵
- (4) In the event an office registered under this statute closes, the physician managing the office's affairs shall inquire of the Committee how to dispose of its medical records.¹⁹⁶

Chapter 12. *Inspection of Offices Registered with the Physicians' Office Procedure Committee.*

Section 1. *Office Inspection Requirements.*

- (1) The Committee, its employees, or its agents may, on an announced or unannounced basis, enter and inspect, during regular hours of operation, offices registered or applying to register under this Act. In conducting such inspections the Committee, its employees, or its agents, shall have access to all premises, equipment, materials, records, and information needed to determine whether the office is being operated in accordance with this Act and any rules and regulations enacted thereunder. During the inspection, the Physicians' Office Procedure Committee, its employees, or its agents, may copy any material required to be submitted to the Committee.¹⁹⁷
- (2) In lieu of or to supplement its own inspection, the Committee may use inspection results from other accrediting agencies.¹⁹⁸

193. See IND. ADMIN. CODE tit. 410, r. 15-2-8(1) (1988); JCAHO, *supra* note 76, at HO.5.2.

194. See IND. ADMIN. CODE tit. 410, r. 16.2-2-6(d) (1988 & Supp. 1991).

195. Cf. 42 C.F.R. § 405.1132(f) (1990).

196. Cf. IND. ADMIN. CODE tit. 410, r. 15-2-8(3)(b) (1988).

197. Cf. 42 U.S.C. § 263a(g)(1) (1988).

198. Cf. GA. CODE ANN. § 31-22-8 (Michie 1991).

(3) Each office cited by the Committee for failure to comply with the provisions of this Act shall document the remedial action taken. This documentation includes reporting the suspension or termination of procedures if necessary.

Section 2. *Equipment Inspection Requirements.*

(1) X-ray equipment shall be inspected at least every twelve months by a radiation health specialist approved by an appropriate state or local agency.¹⁹⁹ The inspection shall include but is not limited to an evaluation of:

- (a) proper collimation and filtration;
- (b) the filtration and exposure rate where the beam enters the patient; and
- (c) storage and usage.²⁰⁰

Section 3. When an inspection of a physician's office reveals a minor or readily correctable defect and the Committee has cause to believe that the immediate interests of patients will be best served by affording the office the opportunity to correct such defects, the Committee shall register the office provisionally for a period of time no longer than six months. To maintain provisional registration, the registrant must agree to implement a plan acceptable to the Committee to remove these defects. The office may be registered after full compliance with the plan.²⁰¹

Section 4. The Committee may upon its own initiative, or may, upon the verified complaint of any person setting forth facts which if proven would constitute grounds for registration revocation, suspension, or limitation pursuant to this Act, conduct an investigation of the office referred to in the complaint. If such investigation discloses grounds therefore, the Committee may request a Panel hearing of the matter.²⁰²

Chapter 13. *Confidentiality.*

Section 1. Medical records shall remain confidential and shall be disclosed only with the written consent of the patient or in the event of a bona fide medical emergency.²⁰³

Section 2. All Committee records including inspection reports, but excluding the list of offices mandated under Chapter 7, Section 1(1), shall remain confidential.

199. Cf. 42 C.F.R. § 405.1416 (1990).

200. Cf. IND. ADMIN. CODE tit. 410, r. 15-1-15(5) (1988).

201. Cf. ARIZ. REV. STAT. ANN. § 36-463.02(e) (Supp. 1990).

202. See *id.*

203. See 38 U.S.C. § 4132 (1988 & Supp. I 1989).

Chapter 14. *The Physicians' Office Procedure Revolving Fund.*

Section 1. The Physicians' Office Procedure Revolving Fund shall consist of monies from gifts, grants, donations, fees from workshops, conferences, and seminars, and fees collected pursuant to this Act.²⁰⁴

Section 2. Monies in the Revolving Fund shall be used to support the administration of this Act including sponsorship of workshops, conferences, and seminars.²⁰⁵

Section 3. Notwithstanding any other law, interest earned on monies in the Revolving Fund shall be credited to the Fund.²⁰⁶

Section 4. The Attorney General or the County Attorney may bring an action in the name of the State to enforce the collection of fees and penalties assessed pursuant to this Act.²⁰⁷

204. Cf. ARIZ. REV. STAT. ANN. § 36-468 (Supp. 1990).

205. See *id.*

206. See *id.*

207. See *id.*

Parental Kidnapping and the Tort of Custodial Interference: Not in a Child's Best Interests

Jessica Larson was less than two years old when her mother, Loree, commenced an action to dissolve her marriage to Jessica's father, John.¹ Jessica was temporarily placed in her mother's custody. When the divorce was final, John was given permanent physical custody of his daughter. Despite the court order granting him custody, John was denied access to his daughter when Loree fled the state with Jessica.

After a seven year search, Loree and Jessica were located with the help of the Federal Bureau of Investigation (F.B.I.) and local law enforcement authorities. They had been living in another state with Loree's second husband. There is evidence that Loree had extensive contact with her parents as well as other relatives over this seven year period, yet her parents had continuously denied to John and law enforcement authorities that they had knowledge of Loree's whereabouts. Loree pled guilty to a criminal charge of felony deprivation of parental rights and Jessica was returned to her father. John then filed a civil lawsuit against Loree, her parents, and other relatives for intentional interference with his custodial rights to his minor child, seeking damages for search related costs, emotional distress and loss of Jessica's companionship and society.²

The Minnesota Supreme Court determined that recognizing the tort of custodial interference³ was not the best public policy for the State of Minnesota and reversed the decision of the state court of appeals.⁴ The court's rationale emphasized the best interests of the children involved in such lawsuits.⁵ After balancing the rights of the injured parent with the probable effects on the children, the court determined that creating this new wrong⁶ would only compound the damages already suffered by the child by placing the child in the middle of additional, vicious litigation.⁷ The fact that existing state law already provided means of

1. *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990).

2. John also alleged intentional interference with visitation rights, civil conspiracy, intentional infliction of emotional distress, and fraud. The Minnesota Supreme Court only considered the tort of intentional interference with custodial rights. *Id.* at 44.

3. The tort of custodial interference as argued before the Minnesota Supreme Court is based on the Restatement (Second) of Torts § 700 (1977). See *infra* text accompanying notes 108-27.

4. *Larson*, 460 N.W.2d at 47.

5. *Id.* at 45.

6. This was a question never before considered by the Minnesota Supreme Court. *Id.* at 44.

7. *Id.* at 39.

redressing this wrong was also instrumental in the decision.⁸ In rendering a decision which is against the great weight of authority,⁹ the Minnesota Supreme Court realized that the tort of custodial interference is not the cure-all for parental kidnapping as some commentators have espoused.¹⁰ Instead, the tort action may actually do more harm than good to the children "caught in the middle."¹¹

This Note examines the tort of custodial interference as applied to parental kidnapping. It first examines the causes and extent of parental kidnapping and briefly discusses the alternative remedies supplied by law. Next, the tort of custodial interference is examined, focusing on its applications and its inherent problems. Finally, the Note concludes that the tort of custodial interference should not be applied in situations involving parental kidnapping and proposes that more effective and less harmful remedies should be sought.

I. THE PROBLEM OF PARENTAL KIDNAPPING

Parental kidnapping has become an epidemic of both national and international concern.¹² By 1985, there were approximately 100,000 cases reported each year, and authorities estimate that there may be as many as 750,000 child snatchings annually that go unreported.¹³ In fact, the abduction of a child by one of his or her parents is far more common than the more emotionally publicized situation when a child is abducted by a stranger.¹⁴

8. The state legislature dealt with the problem by passing laws making the non-custodial parent's actions a felony, allowing recovery of costs and expenses, enforcing custody decrees across state lines, and giving state courts broad discretion to protect custodial and visitation rights. *Id.* at 46-47.

9. By the court's analysis, 21 jurisdictions have ruled on this issue. *Id.* at 44 n.3. Of these, 11 are decisions of state supreme courts, six are state appeals courts rulings, and the others are federal court cases attempting to predict how the state supreme court will rule. *Id.*

10. See Richard A. Campbell, Note, *The Tort of Custodial Interference — Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229.

11. Three justices dissented, citing the following factors as dispositive: respect for unappealed court orders regarding custody, a recognized need for compensation, historical developments in related tort law, the moral aspect of the defendants' conduct, and the preventive and punishment aspects of civil liability. See *Larson v. Dunn*, 460 N.W.2d 39, 47-53 (Minn. 1990).

12. The term parental kidnapping is synonymous with child snatching and child abduction for the purposes of this Note. The international aspects of parental kidnapping are beyond the scope of this Note.

13. *Parental Kidnapping and Child Support: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 1 (1985) [hereinafter *1985 Hearings*] (statement of Senator Arlen Specter).

14. *Id.* at 2 (statement of Senator Mitch McConnell).

A parent may abduct his child for many reasons. Many men feel the legal system is biased against the father in determining custody and visitation rights.¹⁵ As a result, the father may be fearful that he will not be granted custody or any kind of favorable visitation rights. The parent may also be angry about the current custodial arrangement.¹⁶ Another emotion which plays a pivotal role in a child abduction is revenge.¹⁷ The child is used as a tool to inflict pain and suffering on the spouse by an angry, hurt, or bitter parent. The child may be used as a bargaining chip in return for more favorable custody terms, or once cornered, the abducting parent may use the child as an inducement to drop any civil or criminal sanctions that may be pending.¹⁸

Traditionally, several factors contributed to, if not encouraged, the problem of parental kidnapping. First, state courts have historically exercised jurisdiction in custody disputes based on several factors which often resulted in more than one state assuming jurisdiction. Jurisdiction has been based on the child's physical presence within the state, the child's domicile, the parents' domicile, or the fact that the court may have issued the original decree.¹⁹ Because the United States Supreme Court has been unwilling to apply the Full Faith and Credit Clause of the United States Constitution to a state custody decree,²⁰ a noncustodial parent was encouraged to snatch his child, forum shop for a state which would refuse to give full faith and credit to an existing custody decree, and attempt to convince a court in that state to award the abducting parent custody.²¹

15. JOHN E. GILL, *STOLEN CHILDREN* 37 (1981).

16. The noncustodial father feels alienated from his children and angry at the legal system, which places strict limits on the amount of time noncustodial parents are allowed to see their children and punishes them for falling behind on support payments. *Id.* at 37-38. Others feel that the court ordered formula used to compute the amount of child support the noncustodial parent must pay is faulty and part of a vindictive system which drives parents to snatch their children and leave the state. See David S. Redmondini, *State's Child Support Rules Draw Bitter Outburst*, INDIANAPOLIS STAR, Dec. 7, 1990, at A1.

17. *Parental Kidnapping: Hearing Before the Subcomm. on Juvenile Justice of the Sen. Comm. on the Judiciary*, 98th Cong., 1st Sess. 166 (1983) [hereinafter *1983 Hearings*] (statement of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.). Because revenge, not love and concern for the child, is often a primary motive, the child may quickly become a source of aggravation and excess baggage. *Id.* This certainly contributes to the damages suffered by the child. See *infra* text accompanying notes 27-34.

18. *1983 Hearings*, *supra* note 17, at 96 (statement of Hon. Christopher Foley).

19. HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.5 (1988).

20. *May v. Anderson*, 345 U.S. 528 (1953).

21. These factors have been alleviated somewhat by the passage of the Uniform Child Custody Jurisdiction Act in every state. See *infra* text accompanying notes 38-46.

Second, a parent who kidnapped his child had little fear of criminal sanctions. Both state and federal laws historically excluded parents from the statutory definition of kidnapping.²² Any criminal sanctions that did apply were not enforced because an abduction was considered the natural result of a parent's desire to be with his child. Consequently, no unlawful intent was present.²³

Finally, federal agencies such as the Federal Bureau of Investigation were unwilling to use their vast resources and expertise on what it viewed as a domestic dispute.²⁴ As a result, the troublesome custody laws, lack of criminal sanctions, and lackluster attention from law enforcement authorities all contributed to an atmosphere in which self-help and "seize-and-run" attitudes prevailed.

The damages resulting from a parental kidnapping are tremendous. The custodial parent may suffer both physically and emotionally. The custodial parent's life often becomes frozen in time; the uncertainty of their child's future consumes them. The parent may not be able to continue working and often is so distraught that his or her physical health deteriorates. Fatigue, stomach pains, and insomnia are common.²⁵ The terrific frustration felt from enduring a fruitless search gives way to the guilt associated with giving up. The financial effects can be equally devastating. Legal fees and search-related costs can quickly consume life savings and even second or third mortgages.²⁶

As great as the custodial parent's damages are, the damages to the child are worse. The abduction itself may be traumatizing, even violent.²⁷

22. The federal kidnapping statute expressly exempts parents from criminal liability. This statute, also known as the Lindbergh Act, codified the notion that parents, even acting wrongfully, did what they thought was best for the child. 18 U.S.C. § 1201 (1988). Most state laws followed this idea by also exempting parents from criminal liability for stealing their child. SANFORD N. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 90 (1981).

23. See Sanford N. Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 106 (1981) [hereinafter Katz, *Remedies*] (citing *State v. Elliot*, 131 So. 28 (La. 1930); *People v. Nelson*, 33 N.W.2d 786 (Mich. 1948)).

24. *Id.* See also GILL, *supra* note 15, at 66. Local law enforcement officials also view these as domestic disputes and give them low priority. GILL, *supra* note 15, at 66.

25. See GILL, *supra* note 15, at 166-80. One woman could not continue to eat properly and lost 37 pounds in one month. *Id.* at 168. Another finally took her own life because she could not live with the pain any longer. *Id.* at 257.

26. One estimate is that a custodial parent will spend an average of \$20,000 trying to locate and regain custody of the child. *Proposed Federal Parental Kidnapping Prevention Act: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 35 (1979) [hereinafter *1979 Hearings*] (statement of Lawrence H. Statter). Spending much greater amounts is not uncommon. *Id.* at 66 (statement of Susan Downer) (\$150,000 spent); *id.* at 145 (statement of Caroline Dunkley) (\$80,000 spent).

27. One father had several friends help him physically snatch his five-year-old child

The child's education is often neglected because of frequent moves undertaken to stay one step ahead of the custodial parent. The child may even be held out of school altogether.²⁸ Worse still, the abducting parent's fear of being found may cause frequent name changes, resulting in a child who grows up without an identity.²⁹ The emotional impact can be more devastating. The child often feels unloved, mistrustful, insecure, angry at the custodial parent for allowing the abduction to occur, and guilty for causing his parents to split up.³⁰ The child may become the subject of physical or mental abuse and neglect.³¹ In fact, some authorities consider parental kidnapping itself to be child abuse because of the identity changes, instilled fear of police, lies, separation from the other parent, and fugitive lifestyle which is forced on the child.³²

The long-term effects on a child who has been deprived of a stable environment can be substantial. Many carry lifelong scars. Most abducted children grow up to be emotionally unstable.³³ Nightmares and the fear of being kidnapped again are common. Afraid of being alone, these children cling to loved ones and fear strangers, doorbells, and telephones. They may grow up unable to form healthy relationships due to the lack of trust and security they experienced during their formative years.³⁴ Thus, the parental kidnapping exacts a heavy toll, both physical and emotional, on the child, the custodial parent, and the abducting parent who constantly lives in fear of being discovered.

II. CURRENT LEGAL RESPONSES TO PARENTAL KIDNAPPING

A. *Uniform Child Custody Jurisdiction Act*

The traditional jurisdictional problems in child custody matters led the National Conference of Commissioners on Uniform State Laws to

from his mother and grandparents which resulted in the child being sprayed with Mace as well as a car chase. GILL, *supra* note 15, at 40.

28. *Id.* at 144.

29. *Id.* at 147.

30. *Id.* at 149. The child is often told that the custodial parent does not love him or is dead. This form of brainwashing can result in further detrimental consequences once the child is returned to the custodial parent. *Id.* at 150-51 (daughter refused to refer to her mother as "Mom" and kicked and hit her).

31. One organization working to secure the location and return of abducted children gave a profile of the parental kidnapper as being vengeful, unstable, emotionally immature, abusive, and alcohol or drug dependent. 1983 *Hearings*, *supra* note 17, at 166 (statement of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.).

32. *Id.* at 167. Abuse or neglect can range from the lack of proper clothing to a situation in which the father, in fear of apprehension, kills his child and himself. *Id.* at 7 (statement of Lawrence Lippe).

33. See GILL, *supra* note 15, at 139-49.

34. *Id.* at 149.

formulate the Uniform Child Custody Jurisdiction Act (UCCJA).³⁵ The UCCJA has now been adopted by every state and the District of Columbia.³⁶ Among the purposes of the UCCJA is avoidance of jurisdictional competition, deterrence of abductions of children, and facilitation of the enforcement of custody decrees of other states.³⁷ The UCCJA attempts to limit jurisdiction of custody proceedings to one particular state in order to deter forum shopping.³⁸ It does this by establishing guidelines for courts to use in determining which court has jurisdiction over the child.³⁹ An interested court is to determine jurisdiction based on the child's welfare and best interests.⁴⁰ If concurrent jurisdiction exists, the UCCJA requires cooperation between the competing courts⁴¹ and prohibits any court from assuming jurisdiction in the event of forum non conveniens⁴² or if the petitioner has "unclean hands."⁴³

There are a few limitations inherent in the UCCJA. The UCCJA does not make interstate cooperation mandatory, and because it is a state as opposed to a federal statute, it cannot mandate that full faith and credit be given to a custody decree from another state. Because the UCCJA does not function until the abducting parent seeks to change the existing custodial arrangement, it provides no means for locating the child unless and until the abducting parent shows up in another court. Many parental kidnappers never attempt to "legalize" their custody situation. Further, the UCCJA does not provide for compensatory damages to either the damaged custodial parent or child, nor does it contain any means of punishing the abducting parent.⁴⁴

The UCCJA may have an indirect remedial effect. If a state court cannot or will not litigate custody because it determines that another state possesses jurisdiction over the child, that court may enforce any

35. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1988) [hereinafter UCCJA].

36. *Id.* (listing of each state's individual statute).

37. *Id.* at 124.

38. *Id.* §§ 3, 6-7, 9 U.L.A. 143-44.

39. Consequently, courts are precluded from making their jurisdictional decision based solely on the child's physical presence within the state. *Id.* § 3(b), 9 U.L.A. 144.

40. A child's "home state" has jurisdiction unless there is a significant connection between the forum and the child, it is necessary to protect the child in an emergency, or no other state has or is willing to exercise jurisdiction. *See id.* § 3, 9 U.L.A. 143. "Home state" is defined as the state where the child lived with his parent for at least six months prior to the proceeding. *See id.* § 2(5), 9 U.L.A. 133.

41. *Id.* §§ 12-16, 9 U.L.A. 274-316.

42. *Id.* § 7, 9 U.L.A. 233 (encourages judicial restraint whenever another state appears to be in a better position to determine custody).

43. *Id.* § 8, 9 U.L.A. 251 (court is to decline jurisdiction when petitioner has abducted the child or engaged in some other objectionable activity).

44. *See Katz, Remedies, supra* note 23, at 105.

previous custody decree in a habeas corpus action and return the child to the custodial parent located in the other state.⁴⁵ Despite the fact that the UCCJA does not solve the problem in every instance, it effectively eliminates one factor which made parental kidnapping such an attractive option.⁴⁶

B. The Parental Kidnapping Prevention Act

The Parental Kidnapping Prevention Act (PKPA) was passed to supplement the UCCJA and to offer criminal and civil remedies to the victimized parent.⁴⁷ It supplements the UCCJA by mandating that every state shall enforce and refuse to modify an existing custody decree issued by another state pursuant to the provisions of the UCCJA.⁴⁸ This provision closed the doors of non-enacting UCCJA states to forum-shopping child snatchers.⁴⁹ This effectively awards full faith and credit to any existing custody decree.

The PKPA adds federal criminal sanctions for a child snatchers who flee the state. Although federal law enforcement authorities will not prosecute a parental kidnapper, the PKPA provides that any state that has classified parental kidnapping as a felony may request the assistance of the F.B.I. in locating the abducting parent and child.⁵⁰ This is authorized under the federal Fugitive Felon Act which gives the F.B.I. a jurisdictional basis for assisting state law enforcement authorities in the location and apprehension of fugitives from state justice.⁵¹

The PKPA also authorizes use of the Parent Locator Service (PLS) in locating the abducting parent and child.⁵² The PLS is a federal registry used to locate missing parents and was originally established to enforce child support obligations.⁵³ The registry locates a missing parent through computer-based statistics. For instance, social security numbers or un-

45. SANFORD N. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 89 (1981) [hereinafter KATZ, CHILD SNATCHING]. For a discussion of the habeas corpus remedy, see *infra* text accompanying notes 71-72.

46. See *supra* text accompanying notes 19-21 (discussion of forum shopping).

47. For the full text of the act, see Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (1980) (codified in scattered sections of 18, 28 and 42 U.S.C.).

48. 28 U.S.C. § 1738A (1988).

49. All 50 states and the District of Columbia have passed statutes similar to the UCCJA. See *supra* note 36 and accompanying text.

50. 18 U.S.C. § 1073 (1988). For a discussion of whether a state classifies parental kidnapping as a felony or lesser infraction, see *infra* notes 66-68 and accompanying text.

51. 18 U.S.C. § 1073 (1988). The penalty for violations of the Fugitive Felon Act is a fine or imprisonment. *Id.*

52. 42 U.S.C. § 653 (1988).

53. *Id.* § 653(a).

employment compensation numbers may be used to pinpoint the abducting parent's most recent address and employer. The PLS is useless, however, if the abducting parent changes his name and social security number.

Like the UCCJA, the PKPA also suffers from limitations which prevent it from becoming the solution to the parental kidnapping problem. First, the federal kidnapping statute continues to exempt parents from criminal sanctions and the PKPA authorizes federal assistance under the Fugitive Felon Act only if the domicile state treats parental kidnapping as a felony.⁵⁴ Not every state does so.⁵⁵ The Fugitive Felon Act also does not apply if the abducting parent fails to leave the state.⁵⁶ Consequently, the F.B.I. is unable to render assistance to every parent and child victimized by a parental kidnapping.

Second, the F.B.I. has always been reluctant to get involved in parental abductions. Before passage of the PKPA, the F.B.I. interpreted the federal kidnapping statute, which exempts parents, to infer a congressional intent that the F.B.I. stay out of such controversies.⁵⁷ Since the passage of the PKPA, which includes a congressional intent that federal authorities apply the Fugitive Felon Act to parental kidnapping, the F.B.I. has been reluctant to devote full attention and resources to the problem.⁵⁸ It is reluctant to stretch its limited manpower in order to concentrate on what it still sees as a domestic dispute, thereby ignoring more important crimes.⁵⁹ Partial blame can also be directed at local law enforcement authorities who sometimes fail to extradite the abducting parent once found or to drop any criminal charges once the child is returned to the custodial parent.⁶⁰ This lack of cooperation among federal and state authorities adds to the F.B.I.'s reluctance to devote full attention to instances of parental kidnapping.

The Fugitive Felon Act requires that state law enforcement authorities request assistance. The victimized parent alone cannot do so.⁶¹ It also

54. The federal kidnapping statute is codified at 18 U.S.C. § 1201 (1988). See *supra* note 22.

55. See *infra* notes 66-68 and accompanying text.

56. 18 U.S.C. § 1073 (1988) (applies only to those fleeing across state lines).

57. 1983 *Hearings*, *supra* note 17, at 10 (statement of Lawrence Lippe).

58. Pub. L. No. 96-611, § 10(a), 94 Stat. 3573 (1980) (codified at 18 U.S.C. § 1073 (1988)) (express congressional intent that Fugitive Felon Act be applied to acts of parental kidnapping).

59. See 1979 *Hearings*, *supra* note 26, at 36 (statement of Lawrence H. Stotter); Katz, *Remedies*, *supra* note 23, at 106.

60. The F.B.I. only provides assistance to local law enforcement personnel in locating the child snatcher. Federal authorities do not have a prosecutorial function. 1983 *Hearings*, *supra* note 17, at 9. Thus, if the location of the abducting parent is known to local authorities, no federal assistance is forthcoming. *Id.* at 10.

61. *Id.* at 12.

does not authorize the F.B.I. to locate and return the child, only the abducting parent.⁶² Thus any reluctance on the part of local law enforcement officials renders the Fugitive Felon Act useless.

Third, the federal PLS is not available to everyone who may need it. Again, the victimized parent or her attorney cannot request assistance directly. The request must come from a representative who, under state law, has the authority to enforce a child custody determination.⁶³ In addition, the state must contractually subscribe to the PLS.⁶⁴

The primary purpose of the PKPA is to preclude a court from exercising jurisdiction to modify or issue custody decrees in instances of child snatching, as well as to provide federal assistance in locating the abducting parent and child. The PKPA also allows a custodial parent to recover expenses incurred in locating and procuring the return of the child.⁶⁵ Its effectiveness is limited, however, by a lack of uniformity in state kidnapping laws and the indifference of local and federal law enforcement officials.

C. Criminal Sanctions

State kidnapping statutes were historically aimed at third parties. Due in part to the attention of the PKPA, states have recently begun to address the problem of parental kidnapping in the criminal statutes. Special statutes directed solely at parental kidnapping have been passed in several states, and parents can now be held criminally responsible for kidnapping their own child in many others.⁶⁶ Parental kidnapping itself is a felony in many states.⁶⁷ Others make it a felony if the child is removed from the state.⁶⁸ However, many of the state statutes require the existence of a valid custody decree before the child snatching is considered a crime.⁶⁹ Otherwise, both parents are considered equally

62. *Id.*

63. Court officials, law enforcement officials, and federal or state prosecutors are all able to request assistance. However, this is not a mandatory duty. Katz, *Remedies*, *supra* note 23, at 138.

64. See Sue T. Bentch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 375-76 n.86 (1986) (effectiveness of PLS limited by nonadopting states).

65. 42 U.S.C. § 653 (1988) (travel expenses, attorney fees, witness fees, and costs of private investigations).

66. For a complete list of each state's kidnapping or custodial interference statute, see Katz, *Remedies*, *supra* note 23, at 106 app. B.

67. For a listing of those states making parental kidnapping a felony, see Campbell, *supra* note 10, at 238 n.67.

68. *Id.* at 238 n.68.

69. Nearly 70% of parental kidnappings occur before a final custody decree is adjudicated. 1979 *Hearings*, *supra* note 26, at 27 (statement of Bob Westgate).

entitled to custody. A few states have closed this loophole by including in the criminal statute an act of parental kidnapping which occurs before a final custody decree is entered.⁷⁰

Despite tougher criminal laws, parental kidnapping is not effectively addressed by many states' statutes. Too many abductions slip through the loopholes of the very statute which is supposed to deter such conduct. In addition, criminal sanctions do not guarantee the return of the child which is the foremost concern once the abduction occurs.

D. Judicial Remedies

1. *Habeas Corpus*.—The writ of habeas corpus is recognized as the primary remedy for persons who claim that they are legally entitled to the custody of a child.⁷¹ If the custodial parent is able to locate the child, the parent can file a writ of *habeas corpus* in the jurisdiction where the child is physically present. The writ requires the person wrongfully holding the child to turn the child over to the legal custodian. Because the writ allows the petitioner to enforce his current legal rights to the child, the writ requires a valid custody order.⁷² Consequently, the device is useless if final custody has yet to be determined, if the parents are awarded joint custody, or if the custodial parent is unable to locate the child.

2. *Civil Contempt of Court*.—Any violation of a court's custody determination is an act in contempt of court.⁷³ Contempt proceedings are widely used in parental kidnapping situations against not only the abducting parent, but also against anyone who interferes with the administration and enforcement of the custody decree.⁷⁴ A contempt citation offers little relief, however, if the abducting parent flees the state with the child because the citation is only as broad as the jurisdiction of the court that issues it.⁷⁵ Under the UCCJA and PKPA, a court in a second state must recognize an existing custody decree from another state, which

70. See, e.g., TEX. PENAL CODE ANN. § 25.03(a)(2) (Vernon 1989) (includes conduct if custody determination pending); WIS. STAT. ANN. § 948.31(3)(a) (West Supp. 1990) (crime to conceal child from other parent, regardless of legal custody). In addition, both the courts and state criminal laws have denied an abducting parent the defense that a joint custody decree continues to vest both parents with an equal right to custody. See WIS. STAT. ANN. § 948.31(2)(b) (West Supp. 1990) (joint custody does not preclude a finding of a criminal violation); *People v. Harrison*, 402 N.E.2d 822, 824 (Ill App. 1980) (father guilty of child abduction despite joint custody arrangement).

71. KATZ, CHILD SNATCHING, *supra* note 45, at 108.

72. *Id.* at 113.

73. *Id.* at 102.

74. *Id.*

75. *Id.* at 103.

gives it the power to issue a contempt citation over a fleeing child snatcher.⁷⁶ However, the original state court which issued the custody decree has no power over an absent party.⁷⁷ Moreover, a contempt citation provides no relief when the child is kidnapped before custody has been determined.⁷⁸

E. Tort Recovery

The foregoing legal responses are directed at deterring a parental kidnapping or returning the child after he has been kidnapped. These remedies do not provide any compensatory relief to the custodial parent. The victimized parent's primary means of recovering damages has been through the use of various tort claims.⁷⁹ The early common law permitted a father to sue for the loss of a child's services.⁸⁰ Over time, the loss of a child's services was no longer implicitly required in some states and a victimized parent could recover for damage to the relationship between parent and child. The alternative theories of relief are discussed below.

1. False Imprisonment.—False imprisonment is the unlawful detention of another, for any length of time, whereby he is deprived of his personal liberty.⁸¹ This cause of action has been used by a custodial mother to recover damages from the father of her minor child after the father abducts the child.⁸² However, when one parent does not have a sole legal right to the child, as in the situation in which custody has not been determined or the parents are awarded joint legal custody, presumably this cause of action will not be allowed.⁸³ Both compensatory and punitive damages are available to the victimized parent.⁸⁴

76. See *Miller v. Superior Ct.*, 587 P.2d 723 (Cal. 1978) (upholding custody decree issued in Australia and issuing contempt citation against noncustodial mother who had fled to California).

77. KATZ, CHILD SNATCHING, *supra* note 45, at 104.

78. *Id.*

79. Three basic requirements must be met to recover in tort: (1) a duty owed to the victim by the tortfeasor; (2) breach of that duty; and (3) compensable harm to the victim. See WILLIAM L. PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS 4 (5th ed. 1984). For a discussion of the harm suffered by the custodial parent in a parental kidnapping, see *supra* notes 25-26 and accompanying text.

80. The early common law did not recognize a woman as being independent of her husband; thus, a wife could not sue on behalf of herself. The passage of the Married Women's Acts abolished this legal fiction. PROSSER, *supra* note 79, at 916.

81. See *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y. 1978).

82. *Id.*

83. *Id.*

84. A showing of malice is required to collect punitive damages. *Id.* at 19.

2. *Negligence*.—The Court of Appeal of Louisiana, in *Spencer v. Terebelo*,⁸⁵ allowed a tort action based on the general tort law doctrine of negligence per se, which holds that violation of a statute is considered proof of a tort.⁸⁶ The noncustodial parent had violated the state parental kidnapping statute, thus she had breached a duty of recognizing legal custody owed to the custodial parent.⁸⁷ The court awarded general damages as well as travel expenses incurred by the custodial parent.⁸⁸ Sole legal custody is apparently required under this viewpoint. The same court has denied causes of action to a noncustodial parent complaining of interference with visitation rights⁸⁹ and to a parent with joint legal custody.⁹⁰

The Oregon Supreme Court allowed recovery against a third party for simple negligence. In *McEvoy v. Helikson*,⁹¹ the noncustodial mother's attorney was ordered by the court to hold the mother's passport while she had temporary custody of the child during visitation. The attorney breached his duty to the custodial father when he gave the mother her passport while she had physical custody of the child.⁹² The mother subsequently abducted the child and fled to Switzerland in defiance of the court order, and the father was allowed to recover damages from the attorney.⁹³

3. *Alienation of Affections*.—Attempts to recover damages for the alienation of a child's affections have generally been unsuccessful. Nearly all states have either judicially or statutorily abolished this cause of action because such a tort is subject to abuses.⁹⁴ In the parental kidnapping context, courts have often construed an action as being one for alienation of the child's affections if the parent does not have sole legal custody⁹⁵ or if the defendant is a

85. 373 So. 2d 200 (La. Ct. App. 1979).

86. See RESTATEMENT (SECOND) OF TORTS § 874A (1977).

87. *Spencer*, 373 So. 2d at 202.

88. *Id.* at 204.

89. *Owens v. Owens*, 471 So. 2d 920 (La. Ct. App. 1985).

90. *Johns v. Johns*, 471 So. 2d 1071 (La. Ct. App. 1985).

91. 562 P.2d 540 (Or. 1977).

92. *Id.* at 543.

93. *Id.* at 544.

94. See *Bartanus v. Lis*, 480 A.2d 1178, 1181 (Pa. Super. Ct. 1984) (child becomes the object of intrafamily disputes and becomes a strategic tool for use by one family member against another); RESTATEMENT (SECOND) OF TORTS § 699 (1977). For a complete listing of court decisions based on this tort, see Jeffrey F. Ghent, Annotation, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 A.L.R.3d 931 (1974).

95. *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181 (N.Y. Sup. Ct. 1970) (father denied relief for deprivation of custody and visitation rights when mother gained legal custody of child in unilateral divorce action and moved to Israel), *aff'd mem.*, 324 N.Y.S.2d 876 (N.Y. App. Div. 1971).

relative.⁹⁶ These courts use strong language to support their decisions, stating that an action for damages is the least useful technique for the resolution of custody disputes,⁹⁷ and a damages award does not necessarily advance the best interests of the child.⁹⁸ The presence or absence of legal custody seems to be a fine line in determining whether a victimized parent can recover damages and consequently, precludes a large number of parents from doing so.⁹⁹

4. *Civil Conspiracy*.—To recover under this cause of action, the plaintiff must prove the existence of an agreement between two or more individuals to commit an unlawful act, that one or more of the conspirators committed an overt, tortious act in furtherance of the conspiracy, and that the plaintiff suffered damages caused by acts committed pursuant to the conspiracy.¹⁰⁰ In a North Carolina case, the custodial mother sued her child's father as well as his family for damages resulting from the child's abduction.¹⁰¹ Even though the whereabouts of the child and his father were unknown, the mother was allowed to recover against her former in-laws who had managed the abducting parent's business affairs while he was away and made contact with the abductor, yet had refused to cooperate in locating the child. These acts were sufficient to implicate the father's family in a conspiracy to unlawfully abduct the child.

5. *Intentional Infliction of Emotional Distress*.—One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability.¹⁰² Thus, a victimized parent of a parental kidnapping may be able to recover damages under this tort theory. To do so, the court must be convinced that the child snatching is extreme and outrageous. One court stated that parental kidnapping is outrageous because it exceeds all boundaries of behavior usually tolerated by society.¹⁰³ Therefore, most abductions resulting in separation of custodial parent and child would presumably be considered outrageous. One advantage this cause of action has over other tort remedies is that other, lesser interferences with the parent-child relationship may also meet the outrageous standard. It is clear that superior custody rights

96. *Meikle v. Van Biber*, 745 S.W.2d 714 (Mo. Ct. App. 1987) (mother denied relief against grandparents who enticed child away from mother).

97. *McGrady*, 308 N.Y.S.2d at 190.

98. *Meikle*, 745 S.W.2d at 716.

99. See *supra* note 72 and accompanying text.

100. *Coleman v. Shirlen*, 281 S.E.2d 431, 433 (N.C. Ct. App. 1981).

101. *Id.*

102. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

103. *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20 (E.D.N.Y. 1978).

are not required in all states in order to recover.¹⁰⁴ However, not every state allows an action for intentional infliction of emotional distress to proceed regardless of the custody situation. Several jurisdictions have refused to recognize the cause of action when brought by a noncustodial parent for interference with his visitation rights.¹⁰⁵ The stated reasons for this refusal include the danger of encouraging claims for petty infractions, the existence of other effective remedies, and, most importantly, the belief that a claim for damages would not be in the child's best interests.¹⁰⁶

From the custodial parent's viewpoint, the tort of intentional infliction of emotional distress has a distinct advantage over other remedies especially in those states where it is recognized regardless of the custody situation. However, this cause of action neither provides a strong deterrent to a future kidnapping nor guarantees the return of the child.

6. *Custodial Interference*.—Many courts have allowed a victimized parent of a parental kidnapping to recover damages using the tort of custodial interference. The remainder of this Article focuses on this tort's elements, applications, and weaknesses. The tort of custodial interference does not provide a complete remedy. In fact, the practical effects of a tort action outweigh the benefits to the extent that it should not be recognized at all as a remedial measure for parental kidnapping.¹⁰⁷ Finally, alternatives to a tort action will be considered which may exact a lesser toll on the victims of parental kidnapping.

III. TORT OF CUSTODIAL INTERFERENCE

A. *Application to Parental Kidnapping*

The tort of custodial interference is based on the Restatement (Second) of Torts § 700 which reads:

104. See *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985) (father allowed to recover damages for emotional harm resulting from custodial mother's refusal to follow scheduled visitation); *Pankratz v. Willis*, 744 P.2d 1182 (Ariz. Ct. App. 1987) (father allowed to recover damages when custodial mother disappeared with the child depriving the father of his court ordered visitation rights); *Sheltra v. Smith*, 392 A.2d 431 (Vt. 1978) (defendant's conduct rendered it impossible for any personal contact or communication to take place between the plaintiff and her daughter for about four weeks and was found to be outrageous and compensable).

105. See *Owens v. Owens*, 471 So. 2d 920 (La. Ct. App. 1985); *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181 (N.Y. Sup. Ct. 1970), *aff'd mem.*, 324 N.Y.S.2d 878 (N.Y. App. Div. 1971); *Gleiss v. Gleiss*, 415 N.W.2d 845 (Wis. Ct. App. 1987).

106. See *Gleiss*, 415 N.W.2d at 846-47.

107. All tort actions have many of the same weaknesses as the custodial interference action. This Note focuses on custodial interference because it is the cause of action most often used by a victimized parent of a parental kidnapping when he or she is attempting to recover damages.

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has left him, is subject to liability to the parent.¹⁰⁸

Courts rely on this language in allowing the custodial parent to recover damages from the noncustodial parent who kidnaps his own child.¹⁰⁹ The kidnapping need not be motivated by ill will toward the custodial parent or anything other than affection toward the child in order for a cause of action to lie.¹¹⁰ It does not matter whether the child consents to the abduction.¹¹¹ It is enough that the noncustodial parent deliberately interferes with the custodial parent's legal right to the custody of the child. There is a complete defense; however, no liability exists if the noncustodial parent rescues the child from what it reasonably believes is imminent physical harm.¹¹²

Only a parent with a superior right of custody to the child may recover damages because the tort action is based on the interference with a parent's legal right to custody of the child.¹¹³ Unless one parent is vested with a superior right to custody, courts infer that both parents have equal rights in the child's custody.¹¹⁴ Thus, a parent who abducts his child before final custody is awarded or after joint custody is awarded is immune from tort liability.¹¹⁵

The tort of custodial interference provides various damages to a custodial parent victimized by a parental kidnapping. Once the custodial parent has sustained his burden of proving damages, he can recover for the loss of the child's society and companionship.¹¹⁶ Expenses incurred in searching for the child, including legal fees, can be recovered.¹¹⁷

108. RESTATEMENT (SECOND) OF TORTS § 700 (1977).

109. *D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520, 524 (Colo. 1989); *Kipper v. Vokolek*, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977); *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986).

110. RESTATEMENT (SECOND) OF TORTS § 700 comment b (1977); PROSSER, *supra* note 79, at 925.

111. RESTATEMENT (SECOND) OF TORTS § 700 comment a; PROSSER, *supra* note 79, at 925.

112. RESTATEMENT (SECOND) OF TORTS § 700 comment e.

113. *Id.* § 700 comment c (no action can be brought against one parent when both are jointly entitled to custody of the child).

114. *See Kipper v. Vokolek*, 546 S.W.2d 521 (Mo. Ct. App. 1977).

115. *See id.* at 527 (plaintiff did not show lawful custody of child at the time of the abduction); RESTATEMENT (SECOND) OF TORTS § 700 comment c (no liability when both parents jointly entitled to custody of child).

116. *See Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis. 1982), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986).

117. *See Lloyd*, 539 F. Supp. at 1005; *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983).

Damages for mental distress and emotional harm suffered by the custodial parent can also be recovered.¹¹⁸ Any reasonable expenses incurred in treating either the child or custodial parent for bodily or emotional harm suffered as a result of the childsnatching are often recoverable.¹¹⁹ Finally, some courts have imposed punitive damages against the abducting parent.¹²⁰

Liability for custodial interference may also be extended to third parties who aid and abet in the parental kidnapping.¹²¹ Oftentimes, family and relatives of the abducting parent actually participate in the kidnapping or offer aid and support to the abducting parent following the parental kidnapping.¹²² Third parties not directly related to the abducting parent and child have also been found liable.¹²³ One court held a third party liable for providing assistance in a parental kidnapping even though the abducting parent was immune from liability.¹²⁴

Third party liability is usually based on a theory of civil conspiracy which consists of a combination of two or more persons accomplishing an unlawful task.¹²⁵ Recovery under a civil conspiracy theory is vital to many custodial interference actions because courts hold a conspirator

118. See *Fenslage v. Dawkins*, 629 F.2d 1107, 1109 (5th Cir. 1980). *But see* *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983) (claim for severe emotional distress is separate cause of action).

119. See *Lloyd*, 539 F. Supp. at 1003, 1006 (psychologist fees incurred by custodial parent recoverable); RESTATEMENT (SECOND) OF TORTS § 700 comment g (1977) (expenses incurred in caring for child who suffered physical harm recoverable).

120. See *Lloyd*, 539 F. Supp. at 1005 (plaintiff can recover punitive damages upon a showing that the defendant acted with wanton, willful, or reckless disregard for his rights). See also *Campbell*, *supra* note 10, at 256 (large punitive damages awards will deter future parental kidnappings).

121. See *Fenslage v. Dawkins*, 629 F.2d 1107 (5th Cir. 1980) (grandparents, aunts, uncles, cousin); *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis. 1982) (grandparents, stepfather), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978) (grandfather, uncle).

122. See *Fenslage*, 629 F.2d at 1109 (relatives gave false testimony in court proceedings regarding their knowledge of child's whereabouts and provided financial support to abducting parent); *Lloyd*, 539 F. Supp. at 1001 (grandparents provided financial assistance to abducting parent even though they knew abduction was illegal).

123. *Cramlet v. Multimedia, Inc.*, 9 Fam. L. Rep. (BNA) 2452 (D. Colo. May 11, 1983) (producers of the Phil Donahue Show found liable when they had a parental kidnapper on the show as a guest, but refused to divulge the guest's whereabouts to custodial parent). *But see* *Campbell*, *supra* note 10, at 247 (courts have not extended liability to professional child snatchers who aid the abducting parent).

124. *Rosefield v. Rosefield*, 34 Cal. Rptr. 479 (Cal. Ct. App. 1963) (abducting parent was immune because the abduction took place before a final custody order was issued).

125. See *Fenslage*, 629 F.2d at 1110; *Kipper v. Vokolek*, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977). *But see* *Pankratz v. Willis*, 744 P.2d 1182, 1186-87 (Ariz. Ct. App. 1987) (civil conspiracy is not actionable in Arizona; third parties are liable because they are joint tortfeasors).

jointly and severally liable for his own actions as well as his co-conspirators'.¹²⁶ This means that if the judgment against an abducting parent cannot be satisfied, the third party can be held accountable for providing support to the abducting parent as well as for the abduction itself. Some commentators have espoused this strategy as a form of leverage in compelling the abducting parent to return the child.¹²⁷ The tort of custodial interference compensates the custodial parent of an abducted child in the form of money damages. The tort action's weaknesses, however, prevent it from being a satisfactory remedy for parental kidnapping.

B. Limitations Inherent in the Cause of Action

One element of recoverable damages in an action for custodial interference is the loss of companionship or society of the abducted child.¹²⁸ Courts and commentators have long debated whether the non-pecuniary loss which arises out of the interference to the parent-child relationship should be compensable.¹²⁹ The following policy considerations are cited when a parent is refused the right to recover for the loss of a child's companionship and society: (1) the intangible character of the loss, which can never be compensated by money damages; (2) the difficulty of measuring damages; and (3) to a lesser extent, the dangers of multiple claims and liability.¹³⁰ Whether the allegations are attributed to negligent or intentional behavior, the amorphous qualities of this nonpecuniary loss are equally present.

A major weakness of the tort of custodial interference is that only the victimized parent who has been awarded sole custody of the child is able to recover damages.¹³¹ This prerequisite precludes most victimized parents from instituting a lawsuit because the vast majority of parental

126. See *Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis. 1982), *aff'd*, 694 F.2d 489 (7th Cir. 1982).

127. See *Campbell*, *supra* note 10, at 258 (full judgment levied against abducting parent's relatives may provide bargaining chip for return of the child).

128. See *supra* note 116 and accompanying text.

129. See Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976). See generally Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R.4TH 112 (1987).

130. *Baxter v. Superior Ct. of Los Angeles County*, 563 P.2d 871, 873 (Cal. 1977) (action for loss of filial consortium resulting from negligent injury to child). The court distinguished a parent's right of action for an intentional interference with the parent-child relationship by stating that it already existed according to precedent, it posed no danger of multiplication of claims, and it provided a possible deterrent. *Id.* at 874.

131. See *supra* text accompanying notes 113-15 and accompanying text.

kidnappings occur before a final custody decree has been awarded.¹³² Similarly, a parent who has been awarded joint custody is barred from recovering damages in a custodial interference action.¹³³ Any remedy that prevents so many victimized parents from availing themselves of its relief is limited relief indeed.

In addition, courts in some states bar one spouse from suing the other for personal injuries.¹³⁴ This interspousal immunity is based on the policy arguments that tort actions between spouses would either be fictitious (for purposes of defrauding the insurance carrier) or would destroy the peace and harmony of the home.¹³⁵ There are exceptions to this general rule. Some courts do not recognize interspousal immunity when the tort occurred before the marriage, if the action is brought after a divorce, or if the tort was intentional.¹³⁶ Despite these exceptions and the general trend towards abolishing interspousal immunity, a victimized parent may be barred from bringing a custodial interference suit in many states if the abduction occurred before the divorce was final.

A custodial interference action has little effect on a judgment proof defendant. There are examples of ridiculously large damage awards generated out of a sense of outrage at the abducting parent.¹³⁷ Awards of this size have little hope of ever being collected. A lawsuit is also of little use when the defendant-abductor parent cannot be located. A judgment against a parental kidnapper whose whereabouts are unknown provides little solace to a parent who wants her child returned.

Third party liability for custodial interference may have certain inequitable results. When the abducting parent is judgment proof or cannot be located, a custodial interference action often proceeds against any third party who may have aided the abducting parent during or after the child abduction.¹³⁸ Third party participation may range from providing the abducting parent with financial assistance to refusing to cooperate with authorities in the investigation. Because courts often hold third parties jointly and severally liable for any judgment, a third party could be held responsible for satisfying a huge damage award even

132. See *supra* note 69.

133. See *Johns v. Johns*, 471 So. 2d 1071, 1076-77 (La. Ct. App. 1985); RESTATEMENT (SECOND) OF TORTS § 700 comment c (1977).

134. PROSSER, *supra* note 79, at 903. See generally Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3RD 901 (1979).

135. PROSSER, *supra* note 79, at 902.

136. *Id.* at 903-04.

137. One jury awarded a victimized parent \$53 million as compensation for her injuries. See Steve McGonigle, *Custody-Fight "Kidnap" Spurs \$53M Verdict*, NAT'L L.J., Sept. 9, 1985, at 9, col. 1.

138. See *supra* text accompanying notes 121-24.

though the party is, arguably, less culpable than the abducting parent.¹³⁹ In addition, courts have failed to expressly clarify what third party conduct will result in liability.¹⁴⁰ Third parties could therefore be held liable for conduct undertaken without the intent to separate the custodial parent from the child. Finally, estimated figures show that the majority of abducting parents are never located.¹⁴¹ Consequently, limited judicial resources are used to recover money damages from less culpable third parties rather than to return the child to the custodial parent.

Some commentators have argued that the possibility of a custodial interference suit against a parental kidnapper provides a deterrent effect on child abductions which other remedies lack.¹⁴² This possible deterrent effect is limited by two factors. First, most parental kidnappers do not act as a result of a rational decisionmaking process. They act out of bitterness, revenge, or a fear of being separated from their child.¹⁴³ When emotions run this high, a parent will not stop to consider tort liability before snatching his child.¹⁴⁴ Secondly, parental kidnapping is already considered criminal behavior in almost every state.¹⁴⁵ If a parent who is considering abducting his child is not deterred by the threat of a jail term and a criminal record, the possibility of a civil lawsuit weighing on his decision is negligible.

The tort of custodial interference has several weaknesses inherent in both its elements as well as its application. These include the problems of damages to the relationship in general, the sole custody requirement, interspousal immunity, a parental kidnapper who is judgment proof or impossible to locate, and the tort action's lack of a deterrent effect on child abductions. As a result, the tort of custodial interference is not available to many who could benefit from it and has no effect on those whose actions should be punished or deterred in the future.

C. *Best Interests of the Child*

Courts have consistently held that the governing consideration in matters of child custody is the best interests of the child.¹⁴⁶ However,

139. See *supra* text accompanying note 126.

140. Compare *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis. 1982) (parents of abducting parent liable for untruthfully denying any knowledge of the child's whereabouts), *aff'd*, 694 F.2d 489 (7th Cir. 1982) with *Larson v. Dunn*, 449 N.W.2d 751 (Minn. App. 1990) (refusal to cooperate with investigation and untruthful denials concerning child's whereabouts not enough to incur liability), *rev'd*, 460 N.W.2d 39 (Minn. 1990).

141. See 1985 *Hearings*, *supra* note 13, at 1 (statement of Sen. Arlen Specter).

142. See *Campbell*, *supra* note 10, at 256 (punitive damages awards in custodial interference suits will deter future parental kidnappings).

143. See *supra* notes 15-18 and accompanying text.

144. See *Larson v. Dunn*, 460 N.W.2d 39, 46 (Minn. 1990) (family ties are normally stronger than money damages).

145. See *Katz*, *supra* note 23, at 106 app. B.

146. HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 788

too few courts have recognized that the goal of a custodial interference action is not the best interests of the child, but the vindication of one parent against the other.¹⁴⁷ Some courts reason that the goal of tort law is to compensate a victim for a direct interference with his or her legally protectible interest.¹⁴⁸ This legally protected interest is the sole custody of the child. Yet, as one astute court recognized, "When the judicial system becomes involved in family matters concerning the relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided."¹⁴⁹

Several courts have determined that a custodial interference suit between parents is not in the best interests of the child and have refused to recognize the cause of action.¹⁵⁰ Criticism has also come from judicial commentators who were powerless to change the existing law in their respective states.¹⁵¹ These dissenting voices espouse a concern for prolonging family bitterness and providing an additional means of escalating intrafamily warfare. The practical limitations of a tort action have also been recognized, notably that an action for damages is probably the least useful technique for the resolution of custody disputes¹⁵² and that money damages are no relief at all when the child is not returned.¹⁵³

Recognition of the right of one family member to recover money compensation from another exacerbates the damage already inflicted on the child victim of a parental kidnapping. Instead of encouraging the return of a normal relationship between parent and child, a civil tort

(1988). One court took this consideration to an extreme when it allowed the abducting parent to retain custody once the custodial parent located the children after nearly two years. *In re Marriage of Settle*, 556 P.2d 962 (Or. 1976) (court was concerned with disrupting any newly gained sense of security, stability, and continuity).

147. *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987).

148. See *Siciliano v. Capitol City Shows, Inc.*, 475 A.2d 19, 23 (N.H. 1984) (distinguishing the tort of custodial interference from the tort of loss of consortium arising from negligently inflicted injury); PROSSER, *supra* note 79, at 3.

149. *Collins v. Gilbreath*, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980).

150. See *Mantooth v. Richards*, 557 So. 2d 646 (Fla. Dist. Ct. App. 1990); *Larson v. Dunn*, 460 N.W.2d 39 (Minn. 1990); *Friedman v. Friedman*, 361 N.Y.S.2d 108 (N.Y. Sup. Ct. 1974). Courts have also refused to recognize other tort causes of action on the basis of the best interests of the child. See *supra* note 106 and accompanying text.

151. See *Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983) (Wolle, J., dissenting) (Restatement rule will have unacceptable practical consequences and is unlikely to be in the best interests of the child); *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987) (goal of custodial interference tort is vindication of one parent against the other, not the best interests of the child).

152. *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181, 190 (N.Y. Sup. Ct. 1970), *aff'd mem.*, 324 N.Y.S.2d 876 (N.Y. App. Div. 1970).

153. *Bennett v. Bennett*, 682 F.2d 1039, 1045 (D.C. Cir. 1982) (Edwards, J., dissenting).

action prolongs the child's suffering by forcing him to relive the entire traumatic experience. The child becomes the object of what is certain to be a bitter, intense litigation between family members which can only place additional stress on the emotional psyche of a young child.¹⁵⁴ A custodial interference action requires the child to choose sides for one parent and against the other. A tort action could also have long-term consequences. A judgment which takes years to satisfy will be a constant reminder to a child of the pain and suffering endured by all the parties.¹⁵⁵ The child may be resented by family members who unfairly hold the child responsible for the damage caused by the parental kidnapping and subsequent litigation.

The family dissolution process is already known to have a severe effect on children.¹⁵⁶ Significant emotional and behavioral problems are common among children of divorce.¹⁵⁷ Further animosity resulting from turbulent intrafamily lawsuits will only increase the detrimental consequences to the child. The best interests of the child should outweigh the right of a custodial parent to recover money compensation. Allowing the healing process to begin as soon as possible is in the child's best interest.

D. Alternatives to a Tort Action

1. *Statutorily Reimbursed Expenses.*—One of the functions of the custodial interference action is to reimburse the custodial parent for the costs of locating and returning the child.¹⁵⁸ Due to the destructive nature of a tort action, these costs should be collected through other procedures.¹⁵⁹ Several states have statutorily provided for the reimbursement

154. See RICHARD NEELY, *THE DIVORCE DECISION* 78 (1984) (preeminent among the harmful effects of custody litigation per se are uncertainty, psychological probing, e.g., "Who do you love more, Mommy or Daddy?," and competitive parental bribery); Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 126 (1978) (making the child the center of a "vitriolic and extended court battle" may be worse than custody with the less desirable parent).

155. Many children feel guilty and believe that they caused the abduction itself. See GILL, *supra* note 15, at 150.

156. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 703-04 (1985).

157. *Id.*

158. These costs include travel expenses, attorney fees, witness fees, and costs of private investigations. See *supra* note 119 and accompanying text. The search for an abducted child can cost an enormous amount of money. See *supra* note 26.

159. See Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 24 (1987) (citing social and medical reports that show that the child bears the largest cost in litigation); Kim J. Landsman & Martin L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1129-34 (1978) (noting dangers posed to the child by the litigation process).

of reasonable expenses incurred by the custodial parent.¹⁶⁰ This provision is usually located in the statute criminalizing parental kidnapping.¹⁶¹ A criticism of this alternative method of reimbursement is that a court is under no obligation to order the parental kidnapper to reimburse the custodial parent.¹⁶² A simple answer to this is that the legislature has ensured that the mechanism exists. The courts must now be persuaded to take full advantage of this remedial measure whenever it is deemed equitable to do so. Not every state legislature has included a similar provision in its criminal code. Yet, it is a preferable alternative to a tort action and should be included in every state parental kidnapping statute.

A contempt of court action is another available means of recovering costs without resorting to a tort action. A court has a certain amount of flexibility to award costs in a contempt of court action.¹⁶³ Once a parental kidnapper is found to be in contempt of court, the court has the discretion to tax the defendant with the costs of recovering the abducted child.¹⁶⁴

Another form of damages available in a custodial interference action is the cost of treating either the child or custodial parent for bodily or emotional harm suffered as a result of the abduction.¹⁶⁵ This reimbursement could easily be provided for in a state's parental kidnapping statute, as are the reimbursement of search-related expenses.¹⁶⁶

The victims of a parental kidnapping should not be forced to bear the pecuniary costs which are the result of another's wrongful conduct.

160. See MINN. STAT. ANN. § 609.26, subd. 4 (West 1987) (criminal custodial interference statute allows court to assess any expense incurred in returning the child against any person convicted of the violating statute); IND. CODE ANN. § 35-42-3-4(e) (West Supp. 1991) (criminal custodial interference statute imposes reasonable costs incurred by parent because of the taking, detention, or concealment of the child on abducting parent); WIS. STAT. ANN. § 948.31(6) (West Supp. 1991) (court may order violator of criminal custodial interference statute to reimburse any person or governmental entity for reasonable expenses).

161. See *supra* note 160.

162. See *Larson v. Dunn*, 460 N.W.2d 39, 51 (Minn. 1990) (Popovich, C.J., dissenting) (although statute expresses policy that such costs be borne by the wrongdoer, the provision is discretionary and not always enforced).

163. For a discussion of the contempt of court action, see *supra* text accompanying notes 73-78.

164. See *Rayford v. Rayford*, 456 So. 2d 833 (Ala. Civ. App. 1984) (charging parental kidnapper with costs of attorney fees, travel expenses, and private investigators).

165. See *supra* note 119 and accompanying text.

166. See MINN. STAT. ANN. § 609.26, subd. 4 (West 1987) (court may direct appropriate county agency to provide counseling services to the child); WIS. STAT. ANN. § 948.31(6) (West Supp. 1991) (statute provides for restitution to be made to victims of parental kidnapping).

Courts may rely on their discretionary power to assess costs against a parental kidnapper in a contempt of court proceeding. Courts in those states that statutorily provide for the reimbursement of costs may do so as part of the criminal proceeding undertaken against the abducting parent. The judicial system should use its inherent powers to reimburse the reasonable expenses incurred by the victims of a parental kidnapping as an alternative to a tort action.

2. *Tougher Enforcement of Criminal Laws.*—The tort of custodial interference does not provide a sufficient deterrent to parental kidnapping.¹⁶⁷ The best deterrent is consistently enforced laws which impose tough criminal sanctions on the abducting parent. Eliminating the parental exemption from the federal kidnapping statute would provide a uniform law on the federal level to combat this crime. This would permit the resources of the federal government to be applied more frequently than they are now.

Many states must also amend their custodial interference laws to eliminate the loopholes and impose stricter penalties against a parent who abducts his own child. Too many state statutes fail to designate parental kidnapping as a felony or only do so in those instances in which the child is taken out of state,¹⁶⁸ exposed to danger,¹⁶⁹ or taken in violation of an existing custody decree.¹⁷⁰ To be truly effective, any statutory definition of parental kidnapping should include abductions which occur before as well as after custody has been determined. "Custody" should include not only sole physical custody, but also temporary and joint custody arrangements. Furthermore, every statute should provide for the prosecution of any parent who hires another to abduct his child.¹⁷¹

Finally, strict enforcement of parental kidnapping statutes is crucial. Law enforcement authorities on both the federal and state levels must overcome any bias they may have against parental kidnapping complaints. The sheer volume of abductions as well as the tumultuous harm caused to the victims demands that a parental kidnapping be given the same diligence and zealous attention received by other devastating crimes. Once located, a parental kidnapper must be vigorously prosecuted so that the message is clear — parental kidnapping will not be tolerated.

In short, a complete parental kidnapping statute should effectively eliminate any loopholes and impose tough criminal sanctions. Vigorous enforcement of state criminal statutes, coupled with the complimentary

167. See *supra* text accompanying notes 142-45.

168. See, e.g., IND. CODE ANN. § 35-42-3-4 (West Supp. 1991).

169. See, e.g., MASS. GEN. LAWS ANN. ch. 265, § 26A (West 1990).

170. See, e.g., NEB. REV. STAT. § 28-316 (1989).

171. See, e.g., FLA. STAT. ANN. § 787.03 (West Supp. 1990).

effect of the PKPA and UCCJA, will provide an extensive deterrent to parental kidnapping.

3. *Reducing Animosity Between the Parents.*—Further action must be taken to help alleviate the problems which lead to parental kidnapping. The problems should be dealt with before they culminate in a situation from which no real winner can emerge.

One possible approach is a nonadversarial dispute resolution process. A few states require mandatory court-sponsored mediation in all custody cases.¹⁷² Parents are encouraged to consider the best interests of their child when settling the custody determination before the divorce action ever gets to court. If neither parent considers themselves a loser in the custody determination, then parental kidnapping will be drastically reduced.¹⁷³

Another possibility is to permit a non-judicial mediation organization to handle the dissolution process, thereby removing it from the courtroom. These organizations work to instill an atmosphere of cooperation instead of competition between parents, easing the emotional damage on all those affected by a family dissolution.¹⁷⁴

The goal of the mediation process is to minimize the adversarial relationship between divorcing parents, reducing the potential of a child abduction and sparing the child the emotional trauma of being used as a pawn between warring parents.¹⁷⁵ The judicial system should also promote cooperation among parents after a divorce is final. This includes increasing the use of joint custody awards, liberalizing visitation guidelines, and formulating equitable child support guidelines. Diverting parents from a win-lose situation and promoting continual cooperation after divorce will eliminate many of the causes of parental kidnapping.

IV. CONCLUSION

Parental kidnapping is a national epidemic. Unfortunately, the judicial system has historically been at the root of the problem. Congress has responded by enacting the UCCJA and PKPA, thereby eliminating a giant incentive for a bitter, noncustodial parent to abduct his child. State legislatures must continue to enact tougher criminal laws that eliminate existing loopholes for a parent who abducts his own child.

172. For a comprehensive discussion of this alternative, see Sue T. Bentch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 386 (1986).

173. *Id.* at 388-90.

174. See Christopher Carlson et al., *Law, Social Change and Child Snatching*, 14 LOY. U. CHI. L.J. 677, 703 (1983).

175. See Bentch, *supra* note 172, at 390.

Once a child is abducted, better cooperation among state and federal authorities is needed in locating and prosecuting the parental kidnapper.

Several states have also made a tort remedy available to a victimized parent. Although they compensate a bereaved parent with money damages, tort actions fail to account for the best interests of the child who is caught in the middle of intrafamily warfare. The welfare of the child should be the dominant consideration once that child is abducted by one of his parents. A tort action ignores the vulnerability of these children and ultimately increases the psychological costs of a child abduction.

The judicial system should direct its resources towards prospective remedies for parental kidnapping instead of allowing the emotional wounds to fester as a result of a retrospective tort action. Increasing the use of pre-divorce mediation, joint custody awards, liberal visitation, and equitable support decrees should help defuse the situation before it explodes in a parental kidnapping. The best interests of the child demand this. The real victims of a child abduction should expect no less.

JOSEPH R. HILLEBRAND

Interlocutory Appeal of Attorney Sanctions: In Search of a Standard

In the last decade, a dramatic increase in the number of monetary sanction orders imposed against an attorney of record for misconduct in the litigation process has occurred.¹ Coupled with this increase is a rise in the number of appeals by attorneys who question the appropriateness of such sanctions.² These appeals have generated a sharp split among the circuit courts as to whether the appeal should be heard immediately or whether the attorney must await conclusion of the principal case before the appeal may be heard. Conflicting principles attendant to the resolution of this issue have left the search for a common standard unfulfilled.³

In order for federal appellate jurisdiction to exist, the appeal must come from a final order of the trial court or fall within a limited number of legislative and judge-made exceptions. The interlocutory appeal of attorney sanction orders presents a conflict between the principles underlying the final judgment rule and one of the exceptions to the rule, the collateral order doctrine. Furthermore, this conflict is cast in the shadow of the sanction provision's objective. Monetary sanctions can be imposed pursuant to a variety of legislative provisions.⁴ However,

1. For a discussion of the philosophical implications of the necessity for sanctions, their impact on the proliferation of requests for sanctions, and the increasing use of appellate courts to contest such sanctions, see Fred Woods, *Sanctions — Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction*, 17 PEPP. L. REV. 665, 674-78 (1990).

2. *Id.* at 665 & n.2.

3. The sanction orders examined in this Note must be factually distinguished from those orders which award but have yet to quantify attorneys fees, *Jensen Elec. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327 (9th Cir. 1989) (an order imposing monetary sanctions without setting an amount is not a final or appealable order), sanctions imposed jointly against the attorney and his client, *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989) (the joint obligations of the sanction will certainly affect attorney-client relations due to the allocation of financial burden, and the order must therefore be permitted an immediate appeal), sanction orders against an attorney who has withdrawn from the case, *Markwell v. County of Bexar*, 878 F.2d 899 (5th Cir. 1989) (an order assessing sanctions against an attorney who has withdrawn from representation will not impede the progress of the underlying litigation and is therefore immediately appealable), and nonmonetary sanctions.

4. Federal Rules of Civil Procedure 11, 16(f), 26(g), and 37 as well as 28 U.S.C. §§ 1912 and 1927 are aimed at curtailing litigation misconduct. Rules 38 and 46(c) serve as sanction provisions for misconduct at the appellate level. Furthermore, a vast array of federal rules and statutes provide penalties for specific types of violations and proceedings. *See, e.g.*, 26 U.S.C. § 6673 (1988 & Supp. I 1989); FED. R. CIV. P. 30(g)(2), 41(b)-(d), 55; SUP. CT. R. 49.2; TAX CT. RULE 33(b).

the underlying purpose of the sanction provision may differ. Possible purposes for these sanctions include deterrence, compensation, and punishment. Although the procedural safeguards necessary to accomplish the underlying purpose may vary, courts have traditionally made little distinction among the available sanction orders when addressing the issue of appealability.

The central purpose of the finality rule is to avoid piecemeal litigation. Similarly, specific sanction provisions are available to punish an attorney who has delayed litigation proceedings. Alternatively, the collateral order doctrine serves to protect the due process rights of an individual whose access to the judicial system is prejudiced by a delay in appeal. With respect to a sanctioned attorney, this concern is the effective opportunity to be heard. With respect to the client, this concern is the right to fair representation, unbiased by conflicts of interest created by the court. Thus, the issue of appealability must attempt to reconcile these competing considerations.

Attempting to determine the scope of the general finality rule and its exceptions as to the appealability of attorney sanctions, courts have placed considerable emphasis on the attorney's status as a nonparty versus a party to the principal litigation. This distinction has been made predominantly in the context of the attorney's ability to effectively challenge the sanction order without a loss of his due process rights. Although compelling arguments exist pro and con in regard to interlocutory appealability of attorney sanctions, the traditional test of the collateral order doctrine cannot adequately support the development of one standard to be applied under all facts and circumstances.

Procedural devices, either statutory or judge-made, can be developed to assure that the order is effectively reviewable after a final judgment on the principal case. Accordingly, this Note's proposed alternative supports a shift in emphasis from vindication of the attorney's due process rights to the due process rights of the attorney's client. To achieve a workable approach for assuring protection of the client's due process rights, this Note recommends a flexible, balancing approach in which the threat of due process impairment is weighed against the good faith/bad faith objective of counsel underlying the conduct for which he or she was sanctioned.

Part I discusses the statutory rule of finality and exceptions to the rule as possible routes to appellate jurisdiction. In particular, the collateral order doctrine is examined as the dominant theory upon which the interlocutory appeal of attorney sanction orders are decided. Part II analyzes the underlying concerns represented by the rules of appealability and by the various sanction provisions available to serve as a check on attorney conduct. Part III offers alternatives to balance the competing concerns of appealability and the sanction provisions, while striving to achieve a unitary standard in application.

I. THE RULE OF APPEALABILITY

Federal appellate jurisdiction is conferred by 28 U.S.C. § 1291 over all final decisions of the U.S. District Courts.⁵ An order is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."⁶ However, the requirement of finality is to be given a practical, rather than technical meaning.⁷ Accordingly, a number of exceptions to the general finality rule have developed. Statutory exceptions are provided for certification of a partial judgment,⁸ certification of a question of law,⁹ and writs of mandamus.¹⁰

In *Cohen v. Beneficial Industrial Loan Corp.*,¹¹ the Court created the "collateral order" exception to the final decision requirement of section 1291.¹² This exception protects the small class of rights which are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."¹³ To be appealable under the collateral order doctrine, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."¹⁴

An attorney sanction is generally held to represent a nonfinal order and is thus not appealable pursuant to section 1291.¹⁵ Accordingly, the interlocutory appeal of a sanction order overcomes the jurisdictional barrier only if it falls within one of the limited exceptions to the finality rule. Because the available statutory exceptions are inapplicable to attorney sanctions,¹⁶ the controversy surrounding the appeal of attorney

5. 28 U.S.C. § 1291 (1988).

6. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-75 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

7. *Firestone*, 449 U.S. at 375.

8. FED. R. CIV. P. 54(b).

9. 28 U.S.C. § 1292 (1988).

10. *Id.* § 1651.

11. 337 U.S. 541 (1949).

12. *See id.* at 546-47.

13. *Id.* at 546.

14. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citations omitted).

15. *See, e.g., G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824, 827 (10th Cir. 1990); *DeSisto College, Inc. v. Line*, 888 F.2d 755, 761-62 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2219 (1990); *In re Licht & Semonoff*, 796 F.2d 564, 569-70 (1st Cir. 1986); *Frazier v. Cast*, 771 F.2d 259, 261 (7th Cir. 1985). *But see* *Optyl Eyewear Fashion Int'l v. Style Cos.*, 760 F.2d 1045, 1047 n.1 (9th Cir. 1985) (the court stated that a sanction order against a nonparty attorney is final and immediately appealable, but contradicted itself by citing the collateral order doctrine, which applies only to nonfinal orders as the basis for appellate jurisdiction).

16. *See G.J.B. & Assoc.*, 913 F.2d at 827 n.4.

sanctions rests in the judge-made exception to the collateral order doctrine.¹⁷

Application of the doctrine to attorney sanctions has generated a multitude of rationales both supporting and opposing the grant of an interlocutory appeal. Proponents of appealability argue that a sanction assessment is a conclusive determination not to be affected by the outcome of the case,¹⁸ that denial of immediate review would place an attorney in an ethical quandary when considering settlement,¹⁹ and that an order is not reviewable on appeal from a final judgment by a nonparty.²⁰ Conversely, opponents argue that permitting the appeal would allow attorneys to seek delay through voluntary creation and acceptance of sanctions.²¹ Furthermore, the court might respond by refusing to sanction attorneys at all, thereby defeating the very purpose of the sanction itself.²²

In *Cheng v. GAF Corp.*,²³ the court noted that "[t]he order of attorney's fees in this case is clearly a conclusive determination."²⁴ Distinguishing factually an earlier Second Circuit decision, the *Cheng* court relied on the fact that the sanction award was not subject to

17. It has been argued that a writ of mandamus is the only appropriate avenue for the interlocutory appeal of a monetary sanction order against an attorney of record for discovery abuse. Nancy E. Berman, Note, *Monetary Sanctions Against Attorneys for Discovery Abuse in Federal Court: When Can They Be Appealed?*, 9 CARDOZO L. REV. 1021 (1988). However, "mandamus cannot be used to review the district court's exercise of discretion." *Hinton v. Department of Justice*, 844 F.2d 126, 132 (3d Cir. 1988). The decision to impose sanctions and what sanctions to impose are matters commonly within the discretion of the district court. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 110 F.R.D. 363, 367 (D. Del. 1986). Cf. *Eastway Constr. Corp. v. City of N.Y.*, 762 F.2d 243, 254 n.7 (2d Cir. 1985) (although imposition of Rule 11 sanction may be mandated, the type of sanction to be imposed is committed to the discretion of the district judge). Furthermore, the standard by which mandamus is to be utilized, as enunciated in *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943), is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Accordingly, the district court's exercise of its discretionary jurisdiction over sanction orders cannot be checked through the use of mandamus.

18. See *Frazier*, 771 F.2d at 262.

19. See *Cheng v. GAF Corp.*, 713 F.2d 886, 889-90 (2d Cir. 1983) ("appellant's lawyer may be placed in an ethical dilemma; his view of any settlement proposal would almost certainly be colored by its handling of the attorneys' fee issue").

20. See *DeSisto College, Inc. v. Line*, 888 F.2d 755, 762 (11th Cir. 1989); *Frazier v. Cast*, 771 F.2d 258, 262 (7th Cir. 1985); *Cheng*, 713 F.2d at 890.

21. *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik*, 658 F.2d 944, 949 (3d Cir. 1981).

22. *Id.*

23. 713 F.2d 886 (2d Cir. 1983).

24. *Id.* at 889.

adjustment in establishing its conclusive character.²⁵ Similarly, in *Ortho Pharmaceutical Corp. v. Sona Distributors*,²⁶ the court determined that an order conclusively settles the question when a sanction is subject to immediate payment.²⁷ *Ortho* involved sanctions imposed jointly against the attorney and his client. However, this distinction strengthens the proposition that a sanction imposed solely on an attorney is conclusive, because the attorney, unlike the client, lacks the same closeness in connection to the principal case's merits.

An inference may be drawn from *Cheng* and *Ortho* that an order is not a conclusive determination when the amount is subject to adjustment or when the amount is not immediately payable. Regardless, there has been little discussion or disagreement that a sanction order represents a "conclusive determination."²⁸

Similarly, the second prong of the collateral order doctrine, limiting its application to collateral matters completely separate from the merits, has not proven to be an insurmountable obstacle. In *Cheng*, the court noted the lack of connection of the particular sanction order imposed with the merits of the underlying principal case.²⁹ Furthermore, the court stated that "fee questions are not inherently or necessarily subsumed by a decision on the merits."³⁰ In contrast, discovery sanctions represent a matter not completely collateral, because the propriety of such orders cannot be ascertained without a determination of the merits in the underlying action.³¹

The Seventh Circuit in *Frazier v. Cast*³² employed a narrow approach in holding a fee award to be completely separate from the merits. Noting

25. *Id.* (distinguishing *Hastings v. Maine-Endwell Cent. Sch. Dist.*, 676 F.2d 893 (2d Cir. 1982)).

26. 847 F.2d 1512 (11th Cir. 1988).

27. *Id.* at 1515.

28. See *DeSisto College, Inc. v. Line*, 888 F.2d 756, 763 (11th Cir. 1989) (recognizing that a sanction order represents a final disposition regarding the propriety of the attorney's conduct); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985) ("The assessment of \$400 for plaintiff's attorney's fees was a conclusive determination."). See also *G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990) (the court never addressed the conclusive character of the ruling); *In re Licht & Semonoff*, 796 F.2d 564, 573 (1st Cir. 1986) (after finding that the order failed the third prong of the collateral order doctrine, the court noted that it need not inquire into whether it represented a conclusive determination).

29. *Cheng v. GAF Corp.*, 713 F.2d 886, 889 (2d Cir. 1983). The *Cheng* court further argued that the sanction could be appealed without delaying the underlying litigation. *Id.* at 890. However, in practice, such appeals have an "inevitable delaying effect." *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik*, 658 F.2d 944, 949 (3d Cir. 1981).

30. *Cheng*, 713 F.2d at 889 (quoting *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451 n.13 (1982)).

31. *Eastern Maico Distribs.*, 658 F.2d at 947.

32. 771 F.2d 259 (7th Cir. 1985).

that the standard for imposing Rule 11 sanctions is based upon the facts known to the attorney at the point in time at which he acted, the *Frazier* court concluded that the success of an appeal cannot be affected by the outcome of the principal case, whether favorable or not to the client.³³ In essence, the sanction is thus collateral to and separate from the merits not only because the principal case cannot be affected by the outcome of the sanction appeal, but also because the sanction appeal cannot be affected by the outcome of the principal case. These cases demonstrate the importance of the specific sanction provision utilized as well as the particular facts involved when addressing the issue of appealability. Unfortunately, many courts fail to make this distinction.³⁴

The third prong of the collateral order doctrine, that the order must be effectively unreviewable on appeal from a final judgment, commands considerable attention among the circuit courts. The First Circuit emphasized the third factor as the "central focus" and possibly even the "dispositive criterion" in deciding the interlocutory appeal issue.³⁵ Even when a court denies the interlocutory appeal of an attorney sanction order on the policies underlying procedural rules, the holding is usually phrased in terms of the case's inability to satisfy the "effective unreviewability" prong of the collateral order doctrine.³⁶ As will be seen, the arguments surrounding the appealability issue focus on the rights which this prong of the test seek to protect.

In deciding the issue of appealability, the circuit court decisions fall into the framework of two predominant considerations. First, the objective of the finality rule, to avoid piecemeal litigation³⁷ and the objective of the particular sanction employed is frustrated.³⁸ For purposes of analyzing the appealability of attorney sanctions, this will be termed the good faith/bad faith consideration. Second, a sanctioned attorney has the right to be heard and his client has the right to fair representation,

33. *Id.* at 262. *See also* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2456 (1990) (although not decided in the context of an interlocutory appeal, the Court noted that "a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires a determination of a collateral issue").

34. *See infra* notes 84-85 and accompanying text.

35. *In re Licht & Semonoff*, 796 F.2d 564, 571 (1st Cir. 1986).

36. *See, e.g.,* G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 829 (10th Cir. 1990).

37. *See Licht*, 796 F.2d at 569 ("The purpose of the § 1291 requirement limiting appellate review to final decisions is to avoid piecemeal litigation, promote judicial efficiency, reduce the cost of litigation, and eliminate the delays caused by interlocutory appeal.").

38. *See, e.g.,* Eastern Maico Distribs., Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 948-49 (3rd Cir. 1981) (immediate appeal would undermine the purpose of Rule 37(a)(4) to deter litigation delay).

free of unfavorable prejudice imposed by actions of the court. This will be termed the due process consideration.

The cases demonstrate that the three-pronged test of the collateral order doctrine cannot adequately rationalize the conflicting considerations under all facts and circumstances. However, the search for a standard by which to administer precedent has led the majority of federal circuit courts to adopt a stance either allowing or denying the immediate appeal of sanctions imposed on the current attorney of record.³⁹ A danger is created by applying a set standard to circumstances which do not support the rationale used to establish that standard.

In an attempt to establish the standard, courts consistently draw upon the party versus nonparty distinction to aid in their determination.⁴⁰ Such a distinction does not, however, prove conclusive. This is illustrated by decisions which hold that a nonparty cannot effectively obtain review after final judgment as well as decisions which adhere to the rule that only a party can appeal from a final judgment.⁴¹ Additionally, attempts to overcome compelling party/nonparty arguments highlight the struggle between stances which the appealability issue presents. For example, one court found that an attorney's interests are so closely tied to those of the client's that he or she should not be termed a nonparty.⁴²

In an effort to establish some certainty, the emphasis placed on the party/nonparty distinction often leads to adoption of a rule which may, when applied as precedent, prove inequitable under certain circumstances. The search for a standard which demonstrates consistency in application among the circuits continues.

39. See *infra* notes 43-44 and accompanying text.

40. See *G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824, 828 (10th Cir. 1990) (holding that "a district court's sanction order defaulting some but not all the parties to the lawsuit was not appealable until termination of the entire matter. 'Attorneys and parties . . . must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case. . . .'"); *DeSisto College, Inc. v. Line*, 888 F.2d 755, 762 (11th Cir. 1989) ("sanction orders are immediately appealable when the sanction was against 'a non-party'"); *In re Licht & Semonoff*, 796 F.2d at 568, 572 (1st Cir. 1986) (stating that "appellate jurisdiction . . . turns on whether the appellant is a party, nonparty, or attorney and expressly disclaiming an opinion regarding appealability of sanctions against a nonparty or an attorney no longer litigating the case, indicating that counsel of record maintains a position between a party and nonparty which is significant to determination of appellate jurisdiction"); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985) (sanctions imposed against a nonparty must be appealable when entered because the order is not reviewable on appeal from a final judgment); *Cheng v. GAF Corp.*, 713 F.2d 886, 890 (2d Cir. 1983) (citing lawyer's position as a nonparty as a reason for permitting immediate appeal); *Eastern Maico Distribs.*, 658 F.2d at 950 (holding that the sanction order was not immediately appealable, the court noted that "the congruence of interests here is so great that [the attorney's] status as a non-party is arguable").

41. See *infra* notes 43-44 and accompanying text.

42. See *Eastern Maico Distribs.*, 658 F.2d at 950.

II. THE CIRCUIT COURT CONSIDERATIONS

Eight federal circuit courts of appeal have addressed whether current counsel of record may immediately appeal a monetary sanction order for misconduct. Four of these courts held that such orders are immediately appealable, although one circuit did so on the grounds that an attorney sanction is a final order.⁴³ The remaining four circuits held that an appeal cannot be heard until final judgment on the principal case.⁴⁴ The controversy represented by this split of authority is best exemplified by the effects which result from the opposite stances regarding appeal.

A. *Due Process Considerations*

Due process concerns influence whether to grant or deny the interlocutory appeal of a sanction order in two ways. A sanctioned attorney has the right to have his appeal heard in an effective and timely manner. Because only a party to that litigation has standing to appeal from a final judgment, the nonparty attorney must seek procedural alternatives for which definitive guidelines do not exist. Furthermore, even if the nonparty obstacle is overcome, the financial burdens which the attorney must bear may render a later appeal effectively unreviewable. It is the contention of this Note that any due process concerns of the sanctioned attorney are nearly eliminated through the use of procedural alternatives.

The client's right to have his case fairly presented raises a second due process concern. It is possible that the client's representation may be compromised due to the decision to deny counsel's immediate appeal of a sanction order. Such a situation exists where the attorney elects to shift the personal financial burden of the sanction at the expense of the client's representation.

When the circumstances of a particular case raise due process concerns of the client, the analysis of whether to grant or deny an interlocutory appeal of the sanction order must be taken further to examine

43. *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Opty Eyewear Fashion Int'l, Co. v. Style Cos.*, 760 F.2d 1045 (9th Cir. 1985) (stating that a sanction order against a nonparty attorney is final and immediately appealable, but contradicted itself by citing the collateral order doctrine, which applies only to nonfinal orders); *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983). In addition to the foregoing, the Eighth Circuit stated, without discussion, that "Rule 11 sanctions against present counsel to a party are immediately appealable as a final decision under § 1291 and under the *Cohen* collateral order doctrine." *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990) (citations omitted).

44. *G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Click v. Abilene Nat'l Bank*, 822 F.2d 544 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distribs., Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981).

the good faith/bad faith objective of the attorney's sanctioned conduct. However, if this due process concern is not presented, analysis should stop, because there is no further reason for granting an immediate appeal of the sanction.

1. *Attorney's Right To Have Sanction Appeal Heard.*—The statutory right to appeal from a judgment or order of a district court may ordinarily be exercised only by an aggrieved party losing below.⁴⁵ However, the procedural avenues available to one termed a nonparty are not so readily apparent. In *Frazier*, the court stated plainly that sanctions against a nonparty are not reviewable on appeal from a final judgment.⁴⁶ If the parties settle or the client decides not to appeal the final judgment, the attorney is precluded from appealing the sanction order.⁴⁷ Thus, in terms of the collateral order doctrine, the attorney's appeal is "effectively unreviewable" if delayed until conclusion of the principal litigation.

Preservation of the attorney's appeal, however, presents a procedural obstacle which can be avoided by a statutory or judge-made right of appeal. Indeed, other courts have recognized that there is "no reason why an attorney should not be allowed to appeal a sanction order when the main case is terminated without an appeal."⁴⁸ The judicial power to assure this equitable right of appeal was demonstrated in *G.J.B. & Assoc., Inc. v. Singleton*.⁴⁹ The *G.J.B.* court held that an attorney sanction is not immediately appealable under the collateral order doctrine.⁵⁰ Accordingly, an appeal prior to final judgment on the principal case must be dismissed as prematurely filed. However, the court recognized that a retroactive application would leave counsel remediless as the time for filing a new notice of appeal following the final judgment had passed.⁵¹ The court concluded that the attorney's appeal must be heard in this case.⁵²

A more realistic approach to the effective unreviewability prong of the collateral order doctrine requires that the "denial of an immediate appeal would make any effective review 'impossible', or would 'destroy'

45. 2 RICHARD A. GIVENS, *MANUAL OF FEDERAL PRACTICE* § 8.1 (3d ed. 1987).

46. *Frazier*, 771 F.2d at 262.

47. *See id.* *See also DeSisto*, 888 F.2d at 763; *Cheng*, 713 F.2d at 890.

48. *Licht*, 796 F.2d at 572. *See also G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824, 828 (10th Cir. 1990) (third party's interest in a fee determination makes him an aggrieved party whose property interest can only be protected by allowing appeal); *Click*, 822 F.2d at 545 (noting that Rule 11 sanctions are routinely appealed when merged in final judgment without addressing settlement situation or when sanctioned attorney represents successful litigant).

49. 913 F.2d 824.

50. *Id.* at 829.

51. *Id.* at 830.

52. *Id.*

the 'legal and practical value' of appellant's right to appeal."⁵³ Such circumstances have been used to grant an immediate appeal asserted on grounds that a serious liquidity problem may cause harm which is irreparable despite ultimate vindication with return of the funds at a later time.⁵⁴ Additionally, the precarious financial position of the sanctioned party may jeopardize recovery.⁵⁵ Several courts recognize the financial burden placed upon counsel as a factor impacting the effectiveness of a later appeal.⁵⁶ Once again, procedural tools may eliminate or lessen the effect of such circumstances.

The court could safeguard an attorney's financial stability by ordering the delay of payment until final judgment on the sanction order, the holding of funds in trust by the court, or the posting of a payment bond. Inevitably, risk of financial loss to one party must be weighed against the prejudice inflicted on the other. For example, although immediate payment of the sanction may pose a risk of loss to the attorney, prejudice may result by withholding funds from the awarded party. The awarded party must still meet the costs of defending against the litigation for which the sanction was awarded. Accordingly, the appropriateness of procedural tools to balance these conflicting interests should be left to the discretion of the trial judge. In exercising this discretion, factors such as the size of the monetary sanction and the financial condition of the litigants must be considered.

In summary, regardless of the particular tool utilized by the court, procedural alternatives to immediate appeal may be employed to assure the attorney's right to an effective review of a sanction order.

2. Client's Right To Fair Representation.—In contrast to the attorney, greater concern accompanies the due process implications flowing to the attorney's client. As noted, one argument supporting the immediate

53. *In re Licht & Semonoff*, 796 F.2d 564, 571 (1st Cir. 1986) (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376-77 (1981)).

54. *Ortho Pharmaceutical Corp. v. Sona Distribs.*, 847 F.2d 1512, 1517 (11th Cir. 1988) (sanctions imposed against attorney and client jointly are immediately appealable).

55. *Id.*

56. *See id.* ("the considerable size of the sanction and its immediate payability — also serve to bring the order in this case under the practical finality exception"). *See also* *Riverhead Sav. Bank v. National Mortg. Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990) (sanction order is effectively unreviewable if delayed until after final judgment when party receiving the award is in receivership); *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (third prong of the collateral order doctrine is satisfied when there is a strong likelihood of insolvency); *Palmer v. City of Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1986) ("the fees would disappear into insolvent hands" upon enforcement of the sanction award), *cert. denied*, 481 U.S. 1049 (1987); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.) (immediate review necessary to protect funds which are jeopardized by the claims of an intervening party), *cert. denied*, 400 U.S. 878 (1970).

appeal is that the attorney would otherwise be placed in an ethical dilemma when considering settlement.⁵⁷ However, opponents argue that "the [attorney's] self interest in making the sanction part of the settlement is not a matter about which we should speculate. The [attorney's] ethical obligation is to [his] client's best interests."⁵⁸ Regardless of the attorney's ethical obligation, one must observe that he may not fulfill that obligation. Therefore, the court must examine the client's right to fair representation. The due process clause guarantees an aggrieved party the opportunity to present a case and have its merits fairly judged.⁵⁹ "The most basic consideration is whether the person . . . has been given an opportunity to be heard at a meaningful time and in a meaningful manner."⁶⁰ In essence, it is contended that by denying the appeal of an attorney sanction the court interferes with the attorney-client relationship by creating a conflict of interest.

Allocation between counsel and client of the financial burden accompanying a sanction order creates an "obvious" conflict of interest.⁶¹ Though the specific prejudice may not be so clearly identifiable, a conflict of interest likewise exists when an attorney has the power to affect the personal financial burden which he must bear based upon the representation afforded his client. The Second Circuit in *Cheng v. GAF Corp.* stated that "[i]f the fee issue is linked to settlement negotiations . . . [the attorney's] view of any settlement proposal would almost certainly be colored by its handling of the attorney's fee issue."⁶²

One response to such an allegation is to omit the sanction from the settlement and permit its appeal afterwards.⁶³ This response fails to recognize that the attorney's view of settlement could just as easily be colored by the mere fact that it is omitted from settlement. Another response offered to nullify any possible ethical dilemma is for the district court to exercise its discretionary power by revoking the sanction order so as to promote settlement.⁶⁴ How can this not be said to color counsel's view toward settlement? The attorney may advocate settlement in order

57. See *supra* note 19.

58. *In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986).

59. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

60. *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 183 (6th Cir. 1983) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

61. See *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990). See also *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1473-74 (2d Cir. 1988) (client must be separately represented when both the lawyer and client are the subject of a sanction order due to the conflict of interest such a situation creates), *rev'd in part on other grounds*, 110 S. Ct. 456 (1989).

62. *Cheng v. GAF Corp.*, 713 F.2d 886, 889-90 (2d Cir. 1983).

63. *In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986).

64. *Id.* at 573.

to relieve his own financial burden when settlement is not truly in the best interests of his or her client.

Finally, opponents of immediate appeal argue that the possible effect on the attorney-client relationship alone is not enough to make the order effectively unreviewable at a later time.⁶⁵ This argument squarely presents the problem against which a shift in the focus of due process considerations is recommended. It is the client's right to vigorous advocacy which should be emphasized and not the attorney's right to effective review. As previously discussed, the attorney's right to effective review is achievable by procedural alternatives.

If the client is unsuccessful in the principal litigation and feels slighted by counsel's inadequate representation, as induced by a sanction order, she may appeal her judgment. However, this may necessitate delay until her attorney's appeal is complete. For instance, if the sanction was imposed for a frivolous claim or defense under Federal Rule of Civil Procedure 11, dismissal of the claim or defense must necessarily precede or accompany the order because such a sanction represents a ruling on the merits.⁶⁶ The client must wait until her attorney is exonerated before appealing her case on the grounds of that claim or defense. In this respect, the goal to avoid piecemeal litigation is no better accomplished than if the sanction appeal was heard during the principal case. Furthermore, the client faces time constraints in which to appeal the judgment. Failure to appeal within that period renders her appeal unreviewable. Alternatively, if the principal litigation ends in settlement, the client lacks a remedy if it later appears that counsel provided inadequate representation due to the sanction. Although malpractice is a possibility, it may not represent a realistic one.⁶⁷

Similar to the conflict of interest posed to the attorney pursuing settlement, the denial of immediate appeal of a sanction order may create a "chilling" effect with a resulting denial of the vigorous rep-

65. *G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990).

66. Because "[t]he time when sanctions are to be imposed rests in the discretion of the trial judge," FED. R. CIV. P. 11 note (1983), a frivolous claim need not be sanctioned until the completion of the litigation. However, the attorney must be given notice that sanctions are contemplated. *In re Yagman*, 796 F.2d 1165, 1183-84 (9th Cir. 1986). Such notice alone may cause counsel to abandon an asserted claim. Alternatively, sanctions imposed at the end of the litigation do not confront the problem of finality which interlocutory orders face.

67. For a discussion concerning proof of damages in a malpractice action, see John H. Bauman, *Proving Damages for Legal Malpractice*, 25 TRIAL, July 1989, at 45. In order to prevail on the malpractice claim, the client may be required to prove through the use of a trial-within-a-trial the validity of such lost claim or defense. Furthermore, even if it can be shown that the attorney is guilty of a conflict of interest, there remains the difficulty of proving damages in excess of the settlement amount. *Id.*

resentation to which the client is entitled. Although the imposition of a sanction will always have a chilling effect to some degree, the totality of circumstances and the impact of the sanction proceedings on the attorney-client relationship are factors which the court should consider when fashioning a procedure to insure due process.

B. Good Faith/Bad Faith Considerations

Many courts recognize the importance of the good or bad faith of the offender in determining the appropriateness or type of a sanction to be imposed.⁶⁸ When addressing the issue of appealability, courts may be more willing to overcome the general rule against piecemeal litigation where the sanctioned attorney appears to have acted in good faith. Although, by definition, the imposition of sanctions under certain provisions indicate bad faith, the facts may truly represent otherwise. The good faith/bad faith of the attorney must be examined for purpose of evaluating the weight to be given the effects which delay in the appeal may cause. Furthermore, distinctions among the sanctions imposed reveal varying standards of good faith upon which the sanctioned attorney's conduct is judged. For example, under Rule 11, whether a signer acts with an improper purpose is judged under an objective standard.⁶⁹ Although the imposition of section 1927 sanctions has moved toward the rejection of a subjective bad faith standard, at least three circuits have held that bad faith is necessary to sustain such a sanction.⁷⁰

The relevance of the good faith/bad faith state of mind of the sanctioned attorney is shown by considering various grounds for the

68. See, e.g., *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987) ("the absence of deliberate 'harassment' may be a consideration in choosing an appropriate sanction"); *In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986) ("Because of . . . the possibility that the affidavit was clumsily rather than dishonestly drafted . . . we have decided that formal discipline is not appropriate."); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3rd Cir. 1986) (subjective bad faith "may be relevant in determining the form and amount of punishment or compensation").

69. *Flip Side Prods., Inc. v. JAM Prods., Ltd.*, 843 F.2d 1024, 1035 (7th Cir. 1986); *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Lieb*, 788 F.2d at 157; *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

70. See *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989) (subjective bad faith is a requirement of § 1927 sanctions); *Oliveri*, 803 F.2d at 1277; *Baker Indus. v. Cerberus, Ltd.*, 764 F.2d 204 (3d Cir. 1985). Cf. *Walter v. Fiorenzo*, 840 F.2d 427 (7th Cir. 1988) (objective standard for imposition of § 1927 sanctions adopted); *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) (subjective good faith cannot serve as an infinitely expansive safe harbor from sanctions); *Ordower v. Feldman*, 826 F.2d 1569, 1574 (7th Cir. 1987) (although intent is a factor in assessing § 1927 liability, it may be demonstrated through reckless conduct).

denial of appeal. One such ground is that allowing immediate appeal would chart a course to any attorney seeking delay by voluntarily inducing and accepting a sanction.⁷¹ By definition, subjective good faith of the attorney would render such grounds meaningless. A second reason for denying appeal is that the court's response might be to refuse to sanction attorneys at all, thereby defeating the very purpose of the sanction.⁷² For example, one purpose of Rule 37(a) is to sanction attorneys who have unnecessarily delayed the proceedings.⁷³ If an appeal of the sanction is allowed, the attorney may obtain an extension of the very delay for which their conduct was sanctioned. In response to this argument, the court may just as easily impose the sanction and then deny the appeal. Indeed, if the purpose was to create delay it would be said that counsel acted in bad faith and should not generally be permitted immediate appeal. Although the distinction between good and bad faith is not easily ascertainable, it is apparent that some courts have placed a degree of importance on the good faith/bad faith objective of the attorney when addressing appealability.

In *Cheng*, the court stated, "there is no indication in this case that Cheng and his attorney are in collusion to create delay or are in any other way so closely tied that Cheng's lawyer should not be considered a bona fide third party for purposes of this appeal."⁷⁴ The court held that the attorney, as a nonparty, could immediately appeal the sanction imposed.⁷⁵ *Cheng* involved sanctions imposed against the attorney under 28 U.S.C. § 1927 for the frivolous application of mandamus and writ of certiorari. Seeking disqualification of opposing counsel, the attorney sought review of the district court's denial for a second time based upon an intervening Supreme Court decision which held that denial of motions to disqualify could only be reviewed on appeal prior to completion of the principal case under special circumstances warranting a writ of mandamus.⁷⁶ On appeal in the first instance, the circuit court reversed the lower court and granted the motion to disqualify. When addressing the merits of the sanction order, the court noted that Cheng's attorney may have been ethically obliged to once again pursue his disqualification efforts in light of the circuit court's previous ruling. Thus the court acknowledged for a second time the good faith nature of the attorney's conduct.

71. See *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik*, 658 F.2d 944, 949 (3rd Cir. 1981).

72. See, *id.* at 948-49.

73. *Id.* at 949.

74. *Cheng v. GAF Corp.*, 713 F.2d 886, 890 (2d Cir. 1983).

75. *Id.*

76. *Id.* at 887-88 (citing *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368 (1981)).

In contrast, the court in *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik*⁷⁷ relied upon the fact that the sanction order imposed fell under the provisions of Rule 37(a) in denying immediate appeal.⁷⁸ An inference of bad faith appeared when the court noted that the nonparty's interest in resisting discovery, which is protected against by Rule 37(b) sanctions, differs from objectives of harassment and delay which are sanctioned under Rule 37(a).⁷⁹ Furthermore, the court stated that appellate jurisdiction might be appropriate for other types of interlocutory discovery sanctions against a nonparty.⁸⁰ Thus, this seldom observed distinction among sanction provisions placed importance on the bad faith motives of counsel's conduct in denying immediate appeal.

A further distinguishing factor among the various sanction provisions resides in the mandatory versus discretionary nature of their imposition. For example, Federal Rules of Civil Procedure 26(g) and 37 both strive to prevent discovery abuse by way of sanction provisions. However, Rule 37 authorizes broad discretionary powers in the imposition of sanctions while Rule 26(g) mandates the imposition of sanctions for conducting discovery irresponsibly.⁸¹ Thus, while an empty head — pure heart defense may satisfy the court under Rule 37, subjective bad faith cannot be considered before invoking a Rule 26(g) sanction.⁸²

The cases demonstrate a distinction between good faith and bad faith conduct in the grant or denial of an immediate appeal. The significance of this distinction is that a standard of appealability applied to one set of circumstances may prove inequitable under differing circumstances. Once the issue of appealability is addressed, the same court or other courts are likely to rely upon the holding without differentiating between the facts and circumstances. In *Click v. Abilene National Bank*⁸³ the court stated that there is "no obvious reason to differentiate sanctions imposed under Rule 11 from the sanctions that the district court may enter pursuant to Fed. R. Civ. P. 37 or 28 U.S.C. § 1927."⁸⁴ Other courts have similarly cited decisions in support or opposition of interlocutory sanction order appeals without recognizing the mandatory versus discretionary or good

77. 658 F.2d 944 (3d Cir. 1981).

78. *Id.* at 949-51.

79. *Id.* at 949.

80. *Id.*

81. FED. R. CIV. P. 26(g) note (1983). The mandatory nature of Rule 26(g) was imposed due to the reluctance shown to sanction attorneys under Rule 37, one of the sources from which Rule 26(g) derives its authority. *Id.*

82. *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 555 (N.D. Cal. 1987).

83. 822 F.2d 544 (5th Cir. 1987).

84. *Id.* at 545.

faith/bad faith character of the sanction.⁸⁵ Failure to draw a distinction in such situations is to misapply precedent. Accordingly, it is proposed that a distinction between the type of sanction imposed and the underlying facts of the case be factored into the appealability decision.

III. THE ALTERNATIVE

Initially it should be reiterated that the appeal of an interlocutory order can be heard only if it falls within one of the limited exceptions to the statutory finality rule. The collateral order doctrine generally serves as an effective device in evaluating the need for an immediate appeal of a sanction order. However, the traditional application of the doctrine should extend beyond the scope in which it is often utilized.

First, the doctrine's applicability should not be determined solely on the basis of the attorney's status as a nonparty of the principal case. Rather the nonparty designation should be merely one factor in addressing its application. Because procedural alternatives can eliminate most due process concerns impacting upon the attorney as a nonparty, only in the most extreme situations must the collateral order doctrine be invoked to permit immediate appeal for purposes of the attorney's protection.

On the other hand, the client's due process concern of vigorous and fair representation requires case by case analysis. For this purpose, an ad hoc approach must define the level of concern presented by the particular facts of the subject case. Once defined, this due process concern is balanced against conflicting policy considerations concerning the purpose of the attorney's sanctioned conduct.

The cases demonstrate that the technical requirements of the collateral order doctrine are arguably satisfied in all sanction appeal situations. Because an ad hoc approach strives to accomplish the doctrine's underlying purpose of due process, the approach rests on the premise that the technical requirements of the doctrine are met when immediate appeal is deemed appropriate. Accordingly, application of the balancing approach will not violate the principled doctrine on which the interlocutory appeal exception is based.

85. See, e.g., *Frazier v. Cast*, 771 F.2d 259, 263 (7th Cir. 1985). In holding that a Rule 11 sanction order was immediately appealable, the court cited *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984) (§ 1927 sanction was immediately appealable) and *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469 (7th Cir. 1984) (Rule 37 sanction immediately appealable). Other courts have similarly cited § 1927 cases as authority for the immediate appeal of a Rule 11 sanction. See, e.g., *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d 51 (2d Cir. 1987). *But cf.* *Cheng v. GAF Corp.*, 713 F.2d 886, 890 (2d Cir. 1983) (after citing to a case involving Rule 37(a)(4) sanctions the court stated, "[W]e express no opinion on the appealability of sanctions under that section against the attorney rather than the party he represents").

The desire for a standard rule to be applied in all cases must necessarily be addressed when promoting a case by case approach. However, establishing a rule for purposes of certainty in application is inappropriate regarding the appeal of a sanction order. Certainty is a necessary element for planning. Yet, the only planning which certainty adds for appeals would be whether or not to invoke or induce a sanction to obtain delay. Unquestionably, this represents an improper purpose for which certainty need not provide. The critical certainty which must be provided is that an appeal will be allowed if not at the present time, then later. Furthermore, certainty must provide for protection of the due process considerations. To this end, a balancing approach furthers certainty while upholding the integrity of the finality rule.

As an aid in implementing an ad hoc approach to the appealability of sanction orders against a counsel of record, a classification system is proposed. Against the relevant considerations of due process and the good faith/bad faith objective of counsel's conduct lay four possible situations which the court may confront when addressing the issue of appealability: (1) Good faith objective underlying counsel's conduct accompanied by a low due process concern; (2) bad faith objective — low due process concern; (3) good faith objective — high due process concern; and (4) bad faith objective — high due process concern. By first classifying the particular facts of the subject case within one of the four situations, the decision to grant or deny appeal will achieve greater consistency and equitable results for the parties involved. Furthermore, the scope of situations presenting a true issue regarding the right to appeal is significantly narrowed as three of the four factual situations can be easily resolved.

Whether the attorney was acting in good or bad faith when sanctioned for his conduct, the presence of a low due process concern presents a clear case for denying appeal. Furthermore, it is irrelevant whether any existing due process concern relates solely to the client as distinguished from the attorney. As long as the due process consideration is minimal as it bears on either party, there is no reason for departing from the finality rule to allow appealability.

In contrast, immediate appeal should be granted where the sanction order was imposed on good faith conduct and there exists a high due process concern. Although judicial efficiency or some other sanction purpose may be frustrated by allowing the interlocutory appeal, a convincing rationale is lacking to uphold such objectives at the expense of a fair vindication of the individual party's rights.

The final situation which presents the real focal point of the appealability issue is where the attorney has acted in bad faith but where there also exists a high degree of due process concern should immediate appeal be denied. It is within this category that a balancing approach

is proposed whereby the good faith/bad faith conduct of the attorney is weighed against the due process concerns falling upon the attorney and his client. Although it has been asserted that the attorney is afforded procedural alternatives to assure his due process rights, any remaining concerns which bear on the attorney should carry a great deal less weight than those which apply to the client. Moreover, there is a point at which the client's due process concerns demand the grant of an interlocutory appeal despite the bad faith intent of counsel.

To achieve a balance between the competing considerations of the finality rule and protection of due process concerns, a judicial weighing of the relevant prevailing factors must be employed. Specifically, the relevant factors include: (1) whether counsel is attempting to circumvent the purpose of statutory procedures through improper conduct; and (2) whether the financial burdens which accompany the sanction rise to a level creating a conflict of interest, thereby impairing a litigant's due process rights. Only after these factors have been assessed may the decision to grant or deny an immediate appeal be made.

IV. CONCLUSION

The opposite stances maintained by the Federal Circuit Courts exemplify the competing considerations on whether the interlocutory appeal of a sanction order against an attorney of record should be allowed. However, the decisions attempt to define one standard by which the appeal process of all monetary attorney sanctions can be guided. This cannot be accomplished while providing consistent equitable results. It is for this very fact that opposite conclusions have been reached by the circuit courts in independent circumstances. Furthermore, the heavy reliance on the nonparty designation of the attorney is misguided. Although significant in addressing the issue of appealability, this factor alone does not alleviate the financial burdens which could render a delayed appeal effectively unreviewable or the conflict of interest which adversely affects the client's representation.

The search for a standard to guide the procedural process of the appeal of an attorney sanction cannot be fulfilled by one standard. Rather, the standard is a system, a classification based upon the facts, which charts the procedural avenue appropriate to the specific circumstances of each case. Only when the circumstances are classified as a bad faith/high due process concern situation should the grant or denial of an interlocutory appeal be in issue. Then the relevant factors must be weighed on a case by case basis. Through this use of an ad hoc, but structured, balancing approach, greater consistency and fairness in application will become the standard.

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